BACKGROUND

The relationship between the parties dates far prior to INSLAW, Inc. becoming a bankrupt, and certain uncontroverted aspects of that relationship are set forth as briefly as possible as necessary background for understanding how the case develops to its present posture.

In 1973, William Hamilton and Dean Merill formed the Institute for Law and Social Research, a non-profit corporation organized to develop computer software designed to automate the record-keeping and case monitoring activities of law enforcement offices. Under contract to the Law Enforcement Assistance Administration (LEAA), INSLAW developed the Prosecutor's Management Information System ("PROMIS"). The parties do not dispute that this software which the bankruptcy court refers to as "old PROMIS" was developed with public grant money and was in the public domain.

In 1980, the Institute learned that LEAA funding which was the Institute's primary and almost sole source of income would dry up. The Institute then took steps to form a for-profit corporation, INSLAW, Inc., which would continue to market and enhance PROMIS as well as develop new proprietary computer software products. When the Institute on Law and Social Policy transformed itself into INSLAW, the Justice Department had several outstanding contracts with Inslaw. The first contract had been entered into in 1979 by the LEAA. This contract called for a three-year effort to maintain and upgrade PROMIS. However,

by 1981, the LEAA ceased to exist and the Justice Department transferred the contract to its Bureau of Justice Statistics (BJS). But, BJS lacked the funding necessary to carry out the third and final year of the contract. Consequently, the Executive Office of the United States Attorneys (EOUSA) allocated approximately $ 500,000 to pay for the last year of the contract. In return for this funding, INSLAW agreed to make five specific enhancements to PROMIS. These enhancements later became known as the "BJS enhancements".

The Institute also entered into a second contract with the Justice Department in 1979. In this contract, the EOUSA paid for a pilot/feasibility study to determine whether PROMIS could be successfully installed in two large U.S. Attorneys' Offices in California and New Jersey. In addition, the contract directed the Institute to develop a word processing version of PROMIS which would then be introduced into two smaller offices in Vermont and West Virginia.

In late 1981, DOJ decided to go forward and implement the software used in the pilot project in the U.S. Attorneys' Offices, and on November 2, 1981 issued a Request for Proposals ("RFP") seeking bids on a contract to "develop and implement" a litigation management system in 89 U.S. Attorneys' Offices in the continental U.S. and U.S. Territories. More specifically, the contract sought proposals for (1) implementing the computerized "pilot version" of PROMIS as supplemented by the BJS enhancements in 20 "large" U.S. Attorneys' Offices; (2) creating and implementing a non-computerized version of that software for word

processors in the remaining U.S. Attorneys' Offices; and (3) providing necessary training, maintenance and support for three years.

The RFP included a lengthy Statement of Work containing 60 paragraphs, one of which (3.2.4.2) stated:

> All systems enhancements, modifications, and development performed pursuant to this contract shall be incorporated within the systems which have already been installed in the U.S. Attorneys' Offices, including systems installed pursuant to other contracts in the District of Columbia, the District of New Jersey, the District of Vermont, the Southern District of California, and the Southern District of West Virginia.

INSLAW responded to the RFP on December 2, 1981, and in reference to the "enhancements" mentioned in the above paragraph it stated:

> During the life of this project -- but not as a part of this project -- INSLAW plans new enhancements and modifications to the basic PROMIS software and to the original version of PROMIS for U.S. Attorneys.

The parties negotiated for over two months, and finally entered into a contract on March 16, 1982. Prior to the execution of the contract, and for a time thereafter, there were extensive discussions about what INSLAW claimed were privately funded enhancements which were featured in PROMIS. In other words, INSLAW claimed that at the time of entering into the contract their version of PROMIS was considerably more advanced than it was at the time of the pilot project, and that it claimed proprietary rights to those features which were developed with other than government funding.

In late May of 1982 James Rogers, an attorney representing Inslaw during a part of the negotiations, wrote to Stanley Morris, an Associate Deputy Attorney General, as follows:

> [Y]ou expressed concern about the software itself, PROMIS 82, which Inslaw proposes to license to users for a fee commencing in June of 1982. We are prepared to make the following representations, which I think should alleviate the Department's concerns:
>
> PROMIS 82 is the sum of only three parts:
>
> (1) the "Original PROMIS," that is, the public domain software as of May 15, 1981 as memorialized in tapes delivered to the Bureau of Justice Statistics;
>
> (2) enhancements undertaken by Inslaw at private expense after the cessation of LEAA funding; and
>
> (3) the so-called "Printed Inquiry" enhancement, which was created under contract to the Bureau of Justice Statistics and delivered to the Department of Justice on May 17, 1982.

On August 11, 1982, Morris responded:

> We agree that the original PROMIS, as defined in your letter of May 26, 1982, is in the public domain. We also agree that the "printed inquiry" enhancement is in the public domain. To the extent that any other enhancements to the system were privately funded by INSLAW and not specified to be delivered to the Department of Justice under any contract or other arrangement, INSLAW may assert whatever proprietary rights it may have.

Thus, it appeared that the parties had reached an understanding. But as a matter of fact, this was not so, and the relationship between them during implementation of this contract was characterized by what appears to have been unusual controversy. There was unending contention about payment under this contract and the rights of the respective parties.

At the time that this contract was entered into, DOJ's

ager overseeing it was C. Madison Brewer. From
974 to April 1976 Brewer had been employed by INSLAW's
or as its general counsel. The nature and circumstances
eparation from that employment are somewhat in dispute,
s clear that Brewer was not happy in his job when he left
being urged to do so by Hamilton.
LAW attributed its troubles to an acute bias on the part
r, who according to it was intent on running the company
usiness. INSLAW lodged many complaints of bias and made
requests of DOJ to investigate these complaints and give
ief from what it perceived to be grossly unfair
t. DOJ made no meaningful response to these complaints,
AW's fortunes did not change.
November 19, 1982, DOJ's technical representative formally
d a copy of the PROMIS software that was then in use by
Attorneys' Offices. According to the Justice Department
est was motivated by concern over the financial viability
W. It is without dispute that because the government had
ined the minicomputer hardware for each office, INSLAW
for the largest U.S. Attorneys' Offices to use PROMIS on
haring basis. In other words, because INSLAW could not
its software in the individual offices due to the
nt's failure to procure computer equipment, the U.S.
s' Offices were nonetheless allowed to connect-up through
e lines to INSLAW's computer center and use the enhanced
of PROMIS that INSLAW had been providing to its other non-
Department customers. INSLAW took the position that the

Justice Department had no right to the enhanced software that the U.S. Attorneys' Offices had been using since this software had been provided to the Justice Department as a courtesy. DOJ countered that the contract obligated INSLAW to use public domain software for its implementation and that if proprietary enhancements had been added, it was up to INSLAW to prove it.

In an effort to respond to the Justice Department's alleged concern over its financial viability, INSLAW first offered to provide the Justice Department with enhanced PROMIS if the government would agree to limit its distribution to the 94 U.S. Attorneys' Offices and the EOUSA. The government, however, insisted that under its contract, INSLAW must provide software without restriction on distribution. INSLAW then offered to put copies of the disputed software in escrow, so that if INSLAW went bankrupt, then the government would receive the enhanced software and its interest would still be protected. DOJ rejected INSLAW's escrow proposal.

Ultimately the parties sought to resolve their dispute by entering into a modification of the contract. Modification 12, as it became known, entered into on April 11, 1983, contained the following provisions:

> INSLAW would deliver to the government all PROMIS programs and supporting documentation developed for or relating to the contract.
>
> The government shall restrict the distribution of the software to the Executive Office for the U.S. Attorneys and the ninety-four U.S. Attorneys' offices pending resolution of the dispute.
>
> DoJ agreed to continue to make advance payments to INSLAW.

INSLAW agreed to abide by the contractual provisions relating to advance payments.

The parties reaffirmed their understanding that their initial contract governs the rights to the disputed software.

Shortly after the parties agreed to Modification 12, the government terminated the component of the contract that would have automated 74 offices using word processors. The parties disputed whether Modification 12 continued to apply to all 94 U.S. Attorneys' Offices originally in the contract or instead to only the remaining 20 large offices.

Although INSLAW and the Justice Department negotiated over the enhancements that INSLAW indicated that it had included in the proprietary version of PROMIS, the parties could not agree that the enhancements had been paid for with non-government funds. While INSLAW made several efforts to demonstrate the private financing of the enhancements, the government did not accept its methodology for allocating funding. When asked to provide an alternative methodology that would be acceptable, the government declined.

Between August 29, 1983 and February 18, 1985, INSLAW installed PROMIS in all 20 U.S. Attorneys' Offices as provided for under the contract. INSLAW implemented the enhanced version of the software.

On February 7, 1985, shortly before completing the contract with the Justice Department, INSLAW filed for reorganization under Chapter 11 of the bankruptcy code. From the outset of the proceedings in the bankruptcy court, DOJ represented itself as a

major creditor of INSLAW.

Prior to bankruptcy, DOJ had developed a plan to implement PROMIS beyond the 20 offices called for under the contract. In September 1985, upon learning of these plans, INSLAW protested to DOJ that the government's efforts to copy and use PROMIS were unauthorized. Nonetheless, DOJ proceeded to automate 23 additional offices using PROMIS. INSLAW subsequently filed a claim against DOJ for $ 2.9 million, the value of the standard licensing fees for the number of offices which were then to receive the allegedly unauthorized copies of the software.

INSLAW instituted an adversary proceeding against DOJ in which it sought declaratory relief, an order enforcing the automatic stay, and damages for willful violation of the automatic stay. Inslaw, Inc. v. United States, Adv. Proc. No. 86-0069 (Bankr.D.D.C. June 10, 1986). DOJ responded to the complaint by filing a motion for withdrawal of the reference to the bankruptcy court and for dismissal of the complaint. Both of these motions were denied by the chief judge of the district court. Inslaw, Inc. v. United States, Adv. Proc. No. 86-0069 (D.D.C. January 1, 1987 and March 24, 1987). The bankruptcy court then bifurcated the case into two phases, liability (counts I-III) and damages (count IV) and set trial for July 20, 1987. Inslaw, Inc. v. United States, Adv. Proc. No. 86-69 (Bankr.D.D.C. July 20, 1987).

The first major turning point in the litigation occurred in late May and June, 1987. At that time, the bankruptcy court held an evidentiary hearing on INSLAW's allegations that the Justice Department had violated the automatic stay by attempting to

nvert INSLAW's bankruptcy from a reorganization under Chapter 11 o a liquidation under Chapter 7.[1] After six days of testimony, on June 12, 1987, the court ruled that the Department of Justice violated 28 U.S.C. § 362(a), the automatic stay provision of the bankruptcy code, and found the government liable under 28 U.S.C. § 362(h) for compensatory damages, costs and attorneys' fees. The court also held that if § 362(h) did not allow recovery against the government, then in the alternative, the government was in contempt of court for its actions. From the bench, the court assessed compensatory damages of $1,000 as well as attorneys' fees and costs but reserved for later decision the question of whether punitive damages could be awarded against the government. In addition, the court granted INSLAW's request for an injunction against the Justice Department and the Executive Office of the U.S. Trustees ("EOUST") from having contact with the U.S. Trustee handling the INSLAW bankruptcy case but refused to bar the Justice Department from filing a proof of claim against INSLAW. The bankruptcy court order incorporating the bench ruling was issued

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[1] Although the normal method for challenging a party who has violated the automatic stay is to bring an adversary proceeding, that did not occur in this instance. Instead, the court allowed INSLAW to present its charges under a pending motion INSLAW had filed to "obtain independent handling" of the case by the Department of Justice. Motion to Stay Effect of February 17, 1987 Order Retaining Nixon, Hargrave, Devans and Doyle for 30 Days and for Court Assistance to Obtain Independent Handling of the Case by the Department of Justice, In re Inslaw, Inc., Ch. 11, 85-0070 (February 25, 1987). In issuing its ruling, the bankruptcy court recognized that the matter should have been handled as an adversary proceeding. App. at 132, Transcript of Hearing on Independent Handling Motion at 1007, In re Inslaw, Inc., Ch. 11, 85-0070 (June 12, 1987). However, after the investment of six days of hearings, the court was reluctant to "exalt ... form over substance." Id.

on July 26, 1987.

After listening to 23 witnesses and reviewing over 280 exhibits during the adversary proceeding hearings (July 20 to August 5, 1987), in a bench ruling on September 28, 1987 the bankruptcy court announced its decision in favor of INSLAW and set forth the basic grounds for its ruling. In doing so, the court extensively discussed the testimonial evidence as well as key documents. In addition, the court made numerous credibility findings and described the motivations that different witnesses may have had and how their testimony might have been influenced. Basically the bankruptcy court found that Brewer had developed intense dislike for Hamilton and INSLAW and that when he obtained the job as project manager of the contract between INSLAW and DOJ he set out to harm INSLAW, and that ultimately through him and others who acted with him and/or implicitly condoned his efforts, the DOJ converted INSLAW's enhanced PROMIS by trickery and deceit and was using and intended to continue to use INSLAW's enhanced PROMIS in a fashion not contemplated by the contract and in such manner as to damage INSLAW's estate. At the time of the bench ruling the court indicated that:

> Now, with respect to the adversary proceeding of Inslaw against the Department of Justice, I will make a generalized statement at this time and will request counsel for Inslaw to prepare a final judgment in accordance with this statement and will follow this statement with detailed written findings of fact and conclusions of law --

Tr. of Adversary Proceeding, In re Inslaw, Inc., Adv. No. 86-0070 (Bankr.D.D.C. September 28, 1987) (Supp. App. at 43).

The bankruptcy court rendered the following relief:

(1) A declaratory judgment in favor of INSLAW that it is the sole owner of the proprietary enhancements to PROMIS.

(2) A declaratory judgment that the Justice Department wrongfully exercised dominion and control over INSLAW's software, and, as a result, violated the automatic stay.

(3) An injunction directing the Justice Department to be bound by the terms of INSLAW's standard license agreement and requiring the Justice Department to compensate INSLAW under the terms of the license agreement from the date when INSLAW filed for bankruptcy. The court cited Lykes-Youngstown Corp., 504 F.2d 518 (5th Cir.), reh'g denied, 505 F.2d 1304 (5th Cir. 1974). The court left for a later hearing the precise amount due INSLAW.

(4) A prohibition against the Justice Department from electing to use only the older version of PROMIS without first compensating INSLAW for the cost of removing the enhancements.

(5) An injunction preventing several Justice Department officials who were involved in administering the INSLAW contract from further participation in the litigation, or in any decision involving the use of PROMIS at the Justice Department.

(6) An award of attorneys' fees and expenses to INSLAW.

Id. at 84-88. The detailed written findings of fact and conclusions of law in support of its decision were entered on January 25, 1988.

After subsequent hearings on count 4 of the complaint (damages) the court awarded $ 6.79 million to INSLAW. Also costs and attorneys' fees were awarded. These adverse rulings are the subject of this appeal.

INSLAW also sought legal remedies against the Justice

Department before the Department of Transportation Board of Contract Appeals ("DOTBCA"). INSLAW filed notices of appeals with DOTBCA in February 1985, and May and November 1986. Subsequent to these notices, the first complaint before DOTBCA was filed on June 23, 1986, approximately two weeks after INSLAW instituted its adversary proceeding in bankruptcy court against the Justice Department for allegedly breaching the automatic stay provision. Additional claims were filed on September 19, 1986 and August 24, 1987. INSLAW's claims before DOTBCA fall into six categories: (1) computer time-sharing charges associated with the computer center operated by INSLAW and used by several U.S. Attorneys' Offices; (2) contract target fees and voucher payments withheld by the Justice Department and additional fees due INSLAW as a consequence of changes in the scope of work ordered by the Justice Department; (3) indirect costs, including overhead; (4) direct costs; (5) costs, including legal fees, allegedly incurred by Inslaw because of the termination for convenience by the Justice Department of the word processing portion of the contract; and, (6) costs incurred because the Justice Department withheld payments. In four cases, the government counterclaimed for an amount in excess of the original claim. The table below summarizes the parties' claims against each other before DOTBCA.

Claim	INSLAW against DOJ	DOJ against INSLAW
1. Computer Center Costs	$ 409,694	$ 670,735
2. Fees	331,447	35,534
3. Indirect Costs, including overhead	569,751	466,868
4. Direct Costs	92,844	43,615
5. Costs, including legal	76,049	
6. Consequences of withheld payments	109,777	
Total	$ 1,589,562	$ 1,216,752

On February 8, 1987, the bankruptcy court enjoined the DOTBCA proceedings. The Justice Department appealed and this court vacated the order of the bankruptcy court. In March 1989, this court also denied a motion by INSLAW to enjoin the DOTBCA proceedings. United States v. Inslaw, Inc., C.A. No. 89-352 (D.D.C. March 29, 1989). The matter of whether to allow the DOTBCA to proceed is not now before the district court.

DISCUSSION

DOJ makes numerous arguments in support of its appeal:

(1) DOJ contends that under the doctrine of sovereign immunity, the bankruptcy court was without jurisdiction to decide the case. Even if the bankruptcy court had jurisdiction to decide the issues, it should have deferred to an agency board of contract appeals.

(2) DOJ argues that the facts do not support a conclusion that the automatic stay provision of the bankruptcy code had been violated.

(3) DOJ claims entitlement to de novo review. DOJ cites several reasons to support its notion of the standard of review, arguing that under 28 U.S.C.§ 157(d), withdrawal of the proceeding to the district court was required, or alternatively, the bankruptcy court's findings should be treated as contempt of court. Lastly, in support of this claim, the Justice

Department makes the serious charge that the bankruptcy judge was not impartial and should have removed himself. During the course of this litigation, the Court of Appeals for the District of Columbia chose not to reappoint the bankruptcy judge for a new fourteen year term. The Justice Department contends that the decision by the D.C. Circuit not to reappoint the bankruptcy judge and subsequent events may have biased or prejudiced the judge's behavior or, at least, given the appearance of impropriety.

(4) DOJ claims that the bankruptcy court was clearly erroneous in its findings of fact regarding both the adversary proceeding and the proceeding in which the court determined that the Justice Department had illegally attempted to convert INSLAW's reorganization to a liquidation.

(5) DOJ contends that as a matter of law, its actions, even if true, did not constitute a violation of law.

(6) DOJ believes that the bankruptcy court exceeded its authority when it granted relief.

(7) DOJ urges that no attorneys' fees or costs should have been awarded.

It is well settled law that absent waiver, the United States is immune from suit. United States v. Mitchell, 445 U.S. 535 reh'g denied, 446 U.S. 992 (1980); United States v. King, 395 U.S. 1 (1969). Only Congress can waive sovereign immunity; and, such

waivers are to be strictly construed. Rose v. Rose, 481 U.S. 619, 635 (1987); In re Donovan, 872 F.2d 982, 994 (D.C. Cir. 1981).

In enacting the bankruptcy code, Congress waived sovereign immunity in three instances.[2] First, once the government asserts a claim, immunity is waived for any counterclaim arising out of the same transaction or occurrence. 11 U.S.C. § 106(a). There is no limit on the amount of the counterclaim. Second, the government cannot claim immunity from any offset of an allowed claim of the government. The offset need not arise out of the same transaction or occurrence but, recovery is limited to the amount of the government's claim. 11 U.S.C. § 106(b) (1988). Finally, § 106(c) provides an additional waiver of sovereign immunity for those provisions of the bankruptcy code that contain

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[2]Section 106 of the bankruptcy code, 11 U.S.C. § 106 (1988) provides that:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity --
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

"trigger" words regardless of whether or not the government asserts a claim.

The bankruptcy court reasoned that DOJ had waived immunity under §§ 106(a) and (b), and also interpreted § 106(a) as sufficiently broad to bestow jurisdiction. DOJ urges that inasmuch as it had not filed a proof of claim against INSLAW, it had not waived its immunity under §§ 106(a) or (b). It also argues that the bankruptcy court's interpretation of § 106(c) was invalid.

In Hoffman v. Connecticut Income Maintenance Dept., 109 S.Ct. 2818 (1989), the Supreme Court examined whether the eleventh amendment barred monetary recovery against a state under § 106(c).[3] Justice White construed § 106(c) narrowly, holding that because Congressional intent to abrogate the eleventh amendment was not unmistakably clear on the face of the statute, no waiver could be found. Nonetheless, even under a narrow reading of § 106(c), Justice White observed that § 106(c)(2) "is more indicative of declaratory and injunctive relief." 109 S.Ct. at 2823. Indeed, the government concedes that its "sovereign immunity is waived with respect to declaratory and injunctive relief entered pursuant to the automatic stay, section 362." Appellant's Brief at 51, n.36. Thus, at a minimum, under § 106(c) the bankruptcy court had jurisdiction to assess the liability of the Justice Department for violating the automatic

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[3]This case was stayed pending the decision in Hoffman inasmuch as it appeared that it would have a direct bearing on a critical aspect of this case.

stay and for issuing declaratory and injunctive relief pursuant to the finding of liability.

For the bankruptcy court to award compensatory damages, attorneys' fees and costs, jurisdiction must be found in § 106(a). The bankruptcy court concluded that the filing of a formal proof of claim is not a prerequisite to a finding of a waiver of sovereign immunity under § 106(a). Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, reh'g denied, 473 U.S. 926 (1985), mandates that Congressional intent be "unmistakably clear in the language of the statute." See also Hoffman, 109 S.Ct. at 2822. The language of § 106(a) makes no mention of the requirement of a proof of claim. Therefore, no requirement of a proof of claim should be assumed from the statute. Even if the court were to look beyond the face of the statute (contrary to the Supreme Court's teaching in Atascadero), the legislative history provides even more compelling evidence that no proof of claim need be filed.

The original version of § 106 would have predicated a waiver of immunity on the filing of a proof of claim by the government. Both the House and Senate bills contained the following language:

> (a) A governmental unit that files a proof of claim under section 501 of this title is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

H.R. 8200, 95th Cong., 1st Sess., 324 (1977) and S. 2266, 95th Cong., 2d Sess., 313 (1978) (emphasis added). As enacted by

Congress, §§ 106(a) and (b) make no mention of the proof of claim requirement; the reference to the filing of a proof of claim was dropped when the bill became law. The government contends that this was merely a stylistic change. The court is not persuaded by this agrument. "What Congress rejected should not be injected." In re Davis, 20 Bankr. 519, 521 (Bankr.M.D.Ga. 1982). Thus, the allowability of a counterclaim against the government does not require the filing of a formal proof of claim. See also Kennedy, "Automatic Stays Under the New Bankruptcy Code," U. Mich. J. L. Ref. 1, 30 n.120 (1978).

Moreover, § 101(4) defines "claim" very broadly.[4] The definition is a substantial departure from the prior law in which a claim was tied to the concept of provability in an effort to limit the kinds of debts that could be paid in a bankruptcy proceeding. See 2 Collier on Bankruptcy, § 101.4 (15th ed., 1989). Under the present law, many more types of rights are considered claims and are subject to the bankruptcy code. The notion of the filing of a formal proof of claim seems inconsistent

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[4]Section 101(4) reads:

> Claim means --
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
>
> (B) right to equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

with this section of the bankruptcy code as well as § 106(a).

The government's actions throughout the course of the litigation suggest a calculated decision to assert its claims against Inslaw until such time that it appeared that the government had more to lose than to gain. The government should not be allowed to hide behind its shield of sovereign immunity once it enters the fray and manifests a clear intent to put the debtor at risk for its monetary claims.

The existence of the government's claims can be derived from its conduct. Specifically, according to testimony before the bankruptcy court, the government attended the meeting of unsecured creditors. In at least one meeting in March 1985, counsel for the Justice Department asserted the government's status as a creditor. In a motion made to the bankruptcy court contesting the application of INSLAW's attorneys for interim compensation, the government stated that its standing to object rested upon the fact that the United States was "a creditor of debtor Inslaw, Inc." Objection by the United States to the Application for Interim Compensation, In re Inslaw, Inc., Ch. 11, 85-0070 (Bankr.D.D.C. April 17, 1985). In June 1985, the government represented itself to the bankruptcy court as "probably the largest unsecured creditor" of INSLAW. This representation was repeated to the bankruptcy court during a July 2, 1985 hearing of INSLAW's motion for a confidentiality order. Response by the United States to Debtor's Application for Confidentiality of Certain Information, In re Inslaw, Inc., Ch. 11, 85-0070 (Bankr.D.D.C. June 14, 1985). On the basis of this representation, the bankruptcy court

recognized the United States as "one of the largest unsecured creditors in this proceeding." Opinion Concerning Application by Debtor to Hold Certain Information in Camera, In re Inslaw, Inc., 85-0070 (Bankr.D.D.C. July 15, 1985) (App. at 103).

When the United States appealed the bankruptcy court's decision regarding the confidentiality order, it again repeatedly represented itself as a major unsecured creditor. Memorandum of the United States in Opposition to INSLAW's Motion to Dismiss at 1-3, (Supp. App. at 4-6). In the same filing, government counsel flatly proffered that "the United States will assert a claim in this bankruptcy." Id. at 2 (Supp. App. at 5). On July 7, 1987, in a memorandum to support its Motion in Limine, the United states declared that it has asserted counterclaims against INSLAW in the amount of $ 1.45 million. Memorandum of the United States in Support of Its Motion in Limine, In re Inslaw, Inc., Adv. No. 86-0069 (Bankr.D.D.C. July 7, 1987). Two and one-half weeks later, the Justice Department responded to INSLAW's First Set of Interrogatories and reiterated that "DOJ claims that Inslaw owes $ 1,491,335." Defendant's Supplemental Answers to Plaintiff's First Set of Interrogatories, In re Inslaw, Inc., Adv. No. 86-0069 (Bankr.D.D.C. July 27, 1987). In addition, the United States asserted more than $ 1.2 million in counterclaims against INSLAW in the action pending before DOTBCA.

In short, the United States took numerous affirmative steps to assert its claims against INSLAW. The government behaved like a creditor, involved itself directly in the deliberations of INSLAW's efforts to reorganize and, made express representations

during the bankruptcy proceeding to the bankruptcy court and this court. Moreover, it asserted more than $ 1 million in claims in another forum. By its actions, under § 106(a) and the broad definition of claim found in § 101(4), the United States has waived its immunity.

Even if some requirement of a proof of claim could be read into the statute, the government's actions constitute an informal proof of claim. For a document to constitute an informal proof of claim, it must "state an explicit demand showing the nature and amount of the claim against the estate, and evidence an intent to hold the debtor liable." In re Anderson-Walker Industries, Inc., 798 F.2d 1285, 1287 (9th Cir. 1986) (citing In re Sambo's Restaurants, Inc., 754 F.2d 811, 815 (9th Cir. 1985)). Thus, while mere notice of a claim will not suffice, where it is apparent to the bankruptcy court that the creditor intends to seek recovery from the estate and when this intent is made known before the bar date, then an informal proof of claim has been properly filed. In re Int'l Horizons, Inc., 751 F.2d 1213, 1217 (11th Cir. 1985).

In reaching its decision that the government had filed an informal proof of claim, and thus had waived sovereign immunity under § 106(a), the bankruptcy court relied upon In re Davis, 20 Bankr. 519 (Bankr.M.D.Ga. 1982). It concluded that:

> The government should not be permitted to defeat Inslaw's claim against it on the ground that it has not filed a formal proof of claim and hence has not waived sovereign immunity, and then later be able to obtain a distribution from Inslaw's assets by perfecting its already-asserted informal proof of claim. Such a result would offend equity and

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conscience. "Fairness requires that a governmental unit cannot make an informal or incomplete claim to protect its right to share in subsequent distribution and also assert sovereign immunity."

76 Bankr. 224, 230 (quoting In re Davis, 20 Bankr. 519, 523 (Bankr.M.D. Ga. 1982)).

The government counters that Davis is the only case where an informal claim has been sufficient to waive sovereign immunity under § 106(a). However, Davis and the bankruptcy court have made the logical extension from numerous courts that have concluded that a proof of claim can be found once a creditor indicates the nature and amount of his claim and indicates his intent to file a claim. See In re Anderson-Walker Industries, Inc., 798 F.2d 1285, 1287-88 (9th Cir. 1986); In re Sambo's Restaurants, Inc., 754 F.2d 811, 815 (9th Cir. 1985); In re Int'l Horizons, Inc., 751 F.2d 1213, 1217 (11th Cir. 1985). These decisions are wholly consistent with the bankruptcy code.

The government points out that inasmuch as it has stated for the record (after the issue was raised) that it does not intend to perfect its claim by filing a formal proof of claim, there is no possibility of the government participating unfairly in any distribution of INSLAW's estate. However, in effect this renunciation is more damaging to the government's position than it is helpful. Obviously it realizes that but for its expressed renunciation of its intent to perfect its claim, it has already sufficiently asserted a claim so as to be able to perfect it -- even beyond the bar date for filing. In other words, the government attempts to kill a live claim by renouncing its

intention to follow through on it. Under its theory the United States is privileged to raise and lower its protective canopy of sovereign immunity at will -- depending upon the relative advantages of so doing at any particular time. Conceivably, if we were to accept this proposition the government could assert a claim as it has here, and then delay amending it by the "formal proof" until after the statute of limitations had run on some conduct which clearly would have been the basis of a valid counterclaim. There is no indication that the statute contemplates such mischief.

In sum, this court is convinced that under the statutory scheme enacted by Congress, the bankruptcy court correctly exercised its jurisdiction over the United States Justice Department. First, under § 106(c), the bankruptcy court had jurisdiction to hear claims seeking injunctive and declaratory relief. Second, by its actions in portraying itself as a creditor and asserting claims against Inslaw the government waived its immunity under § 106(a) to Inslaw's counterclaims for monetary damages. Thus, the government's sovereign immunity had been effectively waived. Moreover, because § 106(a) forms the basis of the waiver, it is complete; the entire bankruptcy code applies including those provisions such as § 362(h) which provide for monetary damages.

The government next argues that even if the bankruptcy court properly had jurisdiction over the parties, it should have deferred to a specialized agency appeals board. According to the government, where issues of government procurement are involved,

deferral is mandatory.

The government's argument assumes that, in essence, INSLAW's claims against the government are rooted in government contract law. If that were so then the proper forum for relief would be the Department of Transportation Board of Contract Appeals with a right of appeal to the claims court. See In re Gary Aircraft Corp., 698 F.2d 775, 780-84 (5th Cir.), cert. denied, 464 U.S. 820 (1983) (because government contracting law tends to be "technical and esoteric" and there exist specialized fora to resolve such disputes, the liquidation of claims arising out of a contract dispute should be deferred to an agency board of contract appeals).

But the issues in the instant case do not involve the liquidation of a contract claim. Indeed, INSLAW's case is squarely grounded in bankruptcy law. It seeks relief for alleged violations of the automatic stay provision of the bankruptcy code. It is hard to think of a provision more central to bankruptcy policy than the automatic stay provision.

In a case that appears factually quite close to the present dispute, the D.C. Circuit has held that deferral was not only not required but was inappropriate. Megapulse, Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982). In Megapulse, a government contractor sought to enjoin in district court, the dissemination of proprietary trade secrets by the Coast Guard. The government claimed under the contract it had lawfully gained a right to the contractor's trade secrets. Since the dispute involved contract law, the appropriate adjudicatory mechanism was through agency

review and ultimately to the claims court. The district court agreed, but the D.C. Circuit did not.

The Circuit held that the mere existence of a contract is not dispositive of which forum is most appropriate. "The mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action based on trespass or conversion into one on the contract..." 672 F.2d at 968. Like the Justice Department in the instant case,

> [i]t is actually the government, and not Megapulse, which is relying on the contract, attempting to show that the Coast Guard lawfully came into possession of the property and is empowered by the contract to put the entrusted information out for commercial use.... [W]e do not accept the Government's argument that the mere existence of such contract-related issues must convert this action to one based on the contract. This court retains the power to make rational distinctions between actions sounding genuinely in contract and those based on truly independent legal grounds.

672 F.2d at 969-70.

The record shows that the bankruptcy judge properly used his discretion to decide a question of law regarding the ownership of the enhanced PROMIS software that was ancillary to his determination of whether there had been a violation of the automatic stay. Because the matter before the bankruptcy court sounded in bankruptcy law, no deferral was necessary.

The government urges the court to review the bankruptcy Court's finding de novo. First, the government contends that because issues presented in the instant case involved consideration of both the bankruptcy code and other laws affecting

interstate commerce, the chief judge of this court incorrectly refused to withdraw the reference of the case to the bankruptcy court. Second, DOJ argues that the bankruptcy court's findings of fact and determination of liability were made under that court's general civil contempt power and thus must be reviewed de novo. Alternatively, the government claims that because the bankruptcy court purportedly violated its pretrial order, the government is entitled to a new trial. Finally, the Justice Department makes the serious charge that the bankruptcy judge exhibited the appearance of bias and therefore, should have recused himself. This is the second time the government has made this charge. The government filed a petition for writ of mandamus with the district court seeking an order requiring the bankruptcy judge to disqualify himself. The chief judge of this court denied that writ. In re United States, Misc. No. 88-0032 (D.D.C. January 25, 1988). The government now asks this court to declare that recusal was in order and grant a new trial. For the following reasons, the clearly erroneous standard of review will be applied to the bankruptcy court's findings of fact and no new trial will be granted.

The standard of review for a core proceeding as defined by 28 U.S.C. § 157 is set forth in Bankruptcy Rule 8013:

> Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact
>
> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless

> clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

The Advisory Committee Note to Rule 8013 indicates that the appropriate standard of review of the findings of a bankruptcy court should be the same as the review standard accorded a district court under Rule 52 of the Federal Rules of Civil Procedure. See also Briden v. Foley, 776 F.2d 379, 381 (1st Cir. 1985) (Rules 7052 and 8013, which require the application of the clearly erroneous standard to a bankruptcy court's findings of fact, are constitutional as applied to core proceedings); 1 Collier on Bankruptcy, § 3.13[7] (15th ed. 1989). Of course, issues of law are reviewed de novo. In re Contractors Equipment Supply Co., 861 F.2d 241, 243 (9th Cir. 1988).

There is little doubt that an adversary proceeding represents a core proceeding. The bankruptcy code so provides. Core proceedings under 28 U.S.C. § 157(b)(2)(A) (Supp. II 1983) include "matters concerning the administration of the estate." The allegation by INSLAW that the government exercised unlawful dominion and control of its PROMIS software surely would satisfy this provision. In addition, further support can be found in subsection § 157(b)(2)(C) which makes "counterclaims by the estate against persons filing claims against the estate" core proceedings. By inference, § 157(b)(2)(G) which defines "proceedings to terminate, annul, or modify the automatic stay" as core proceedings lend additional justification. In analyzing this question, the Fourth Circuit has taken the well-reasoned view that proceedings to prosecute the automatic stay are core proceedings

der the bankruptcy code. See Budget Service Co. v. Better Homes of Virginia, Inc., 804 F.2d 289 (4th Cir. 1986). Consequently, because prosecution of a violation of the automatic stay is a core proceeding and Congress has accorded bankruptcy judges the power to make factual findings in such proceedings, the standard of review as set forth in Bankruptcy Rule 8013 is that of clear error.

For the same reasons, the government's contention that the bankruptcy court's findings of fact were made under the court's general contempt power also appears to be misplaced. INSLAW's allegation that the government illegally attempted to convert its Chapter 11 reorganization into a Chapter 7 liquidation unquestionably falls within § 157(b)(2)(A). As such, it is a core proceeding. Similarly, INSLAW's charge that DOJ illegally appropriated its property and sought to distribute it without regard to INSLAW's claimed proprietary interest, at a minimum, threatened the estate under § 157 b)(2)(A) and was a counterclaim under § 157(b)(2)(C). Both the alleged illegal conversion and the misappropriation of property could properly be contested in an adversary proceeding which as demonstrated supra is a core proceeding. Therefore, the powers vested to the bankruptcy court under the automatic stay provision, 11 U.S.C. § 362, do not violate the Constitution as the government claims. See Budget Service Co. v. Better Homes of Virginia, 804 F.2d at 292-93, ("bankruptcy courts acting through bankruptcy judges may enforce the sanctions of § 362(h) without reference to a finding of civil contempt"). Furthermore, under § 362(h), a debtor may recover

actual damages, including costs and attorneys' fees. Thus, the standard of review in this case is not the standard applicable for civil contempt, but rather is the clearly erroneous standard relevant for core proceedings.

The government next suggests that the chief judge of this court erred when he did not agree to withdraw to the district court the referral of the bankruptcy case. Section 157(d), in pertinent part, states:

> The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d) (Supp. II 1983).

The relevant test of whether a bankruptcy matter should be withdrawn to the district court is whether the district court judge can make "an affirmative determination that resolution of the claims will require substantial and material consideration of those non-[bankruptcy] code statutes." In re White Motor Corp., 42 Bankr. 693, 705 (N.D. Ohio 1984). It is only those cases which require a significant interpretation of federal laws that must be withdrawn. See In re Johns-Manville Corp., 63 Bankr. 600, 602 (S.D.N.Y. 1986) (favorably applying In re White Motor).

In the instant case, the allegation of the illegal conversion of INSLAW's bankruptcy case implicates no federal law other than the bankruptcy code. The adversary proceeding which involved an issue over the ownership and control of the PROMIS software appears to this court to require first, an analysis of the scope

of work and then, an interpretation of a contract. In interpreting the contract, a bankruptcy court may have to apply federal procurement regulations, but it is not apparent that there need be any substantial interpretation of federal laws by the bankruptcy court. Therefore, the court concurs in the decision of the chief judge not to withdraw the case from the bankruptcy court.

The government also contends that the bankruptcy court violated its pretrial order limiting the scope of the adversary proceeding. As a result, the government did not put on its case with regard to certain matters and now claims that the result was fundamentally unfair and prejudicial. On July 20, 1987, the bankruptcy court entered an order which sought to restrict phase I of the adversary proceeding to whether INSLAW maintained a proprietary right to the PROMIS software and whether C. Madison Brewer was biased and lacked impartiality towards INSLAW. Order Limiting Issues to be Tried at This Time, In re Inslaw, Inc., Adv. Proc. No. 86-0069 (Bankr.D.D.C. July 20, 1987). The bankruptcy court sought to reserve until a later date the litigation over several contract-specific questions such as the allocation of computer time-sharing costs, termination of the word processing portion of the contract, overhead rates, DOJ's alleged withholding of fees and INSLAW's proposal to substitute computers for word processors. In addition, the court also sought to delay the presentation of whether DOJ negotiated in good faith and the determination of DOJ's counterclaims and/or offsets against INSLAW, as well as the post-petition acts of Dean Cooper. Id.

clear from the bankruptcy court's conclusions of law
e court held to its mission as described in its pretrial
he court's six principal conclusions of law are that:
AW's proprietary enhancements are entitled to protection
secrets; (2) DOJ unlawfully used those enhancements in
1 of the automatic stay; (3) the failure of DOJ to cure
j by which it induced INSLAW to enter into Modification 12
:s a further violation of the automatic stay; (4) the
of DOJ to correct bias against INSLAW also represents a
n of the automatic stay; (5) INSLAW is entitled to
t injunctive relief; and (6) INSLAW is entitled to costs
rneys' fees. A comparison of the conclusions of law and
rial order show a close correlation. While there may have
e overlapping factual questions among the issues tried in
and those reserved for a later determination, the court
gree that the bankruptcy court violated its pretrial

eover, the bankruptcy court may amend its pretrial order
rm to the evidence. Bankruptcy Rule 7016 which would
the issuance of pretrial orders applies Fed. R. Civ. P.
er the federal rules, district court judges have broad
on to depart from their pretrial orders. See Patterson v.
h Co., 786 F.2d 874, 879 (8th Cir. 1986) ("flexible
ion of pretrial orders" is reserved to the sound
on of the district court); Robert v. Conti Carriers &
s, Inc., 692 F.2d 22, 24 (5th Cir. 1982) (trial judges
cretion to admit evidence not included in pretrial

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order). Absent a clear showing of abuse of discretion, the trial court's decision should be accepted. Lirette v. Popich Bros. Water Transport, Inc., 660 F.2d 142, 144 (5th Cir. 1981). The court is satisfied that the government did not suffer any undue prejudice when the bankruptcy court made its findings of fact. No new trial on those issues is indicated.

Lastly, in arguing for a new trial on the issues the government contends that Judge Bason should have recused himself and that the appearance of impropriety tainted his decision. The factual setting involves the decision on January 11, 1988 by the United States Court of Appeals for the District of Columbia Circuit not to reappoint Judge Bason to a fourteen-year term. Subsequent to that decision, Judge Bason wrote a lengthy letter to Chief Judge Wald of the D.C. Circuit. In this letter, Judge Bason described his credentials, questioned the validity of the reasons given for why he was not reappointed, and raised the possibility that other unstated reasons may have led the court of appeals not to reappoint him. Within one week, two newspapers carried accounts of Judge Bason's letter. Washington Post, January 18, 1988; Legal Times, January 18, 1988. The government claims that the decision not to reappoint Judge Bason tainted his judgment in the case and that his letter to Chief Judge Wald and the press reports gave the appearance of impropriety.

On January 19, 1988, the government first filed a motion before Judge Bason requesting that he recuse himself. After a hearing on January 22, the bankruptcy court denied the government's motion in a memorandum and order filed January 25,

1988. On the same day, the government argued a motion before the chief judge of the district court for a writ of mandamus directing Judge Bason to recuse himself. The chief judge denied the government's writ in a bench ruling. In re United States and the United States Department of Justice, Misc. Case No. 88-032 (D.D.C. January 25, 1988).

In its motions before Judge Bason and Chief Judge Robinson, the government cites two recusal statutes, 28 U.S.C. § 144 and 28 U.S.C. § 455. While there is no disagreement over the applicability of 28 U.S.C. § 455, INSLAW argues and Judge Bason agrees that 28 U.S.C. § 144 does not apply to bankruptcy judges.[5] In any case, it is unnecessary to decide the legal question, because under any standard, the evidence put forth by the government is insufficient.

As evidentiary support for its motion for recusal, the government relied on the letter sent by Judge Bason to Chief Judge Wald, the press reports and, to satisfy the requirements of § 144, an affidavit of Deputy Assistant Attorney General Stuart Schiffer. The deputy assistant attorney general's affidavit contains no facts based on personal knowledge. Instead, the affidavit recites the press accounts.

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[5]Although Chief Judge Robinson may have been confronted with the question of the applicable statute, he does not address the question. In his oral ruling from the bench, it is apparent that the standard he applies is 28 U.S.C. § 455. Transcript at 33, In re the United States and the United States Department of Justice, Misc. Case No. 88-032 (D.D.C. January 25, 1988).

As Chief Judge Robinson noted:

> I can't see anything in this record that measures up to the standards that would be applicable to force another judge to take over this case. There isn't any doubt in my mind, for example, that the declaration filed in support of the original motion is inadequate.

Tr. at 33, In re the United States and the United States Department of Justice, Misc. Case No. 88-032 (D.D.C. January 25, 1988) (Supp. App. 125). This court agrees.

Press accounts are simply an inadequate basis for requiring recusal. "Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers." In re United States, 666 F.2d 690, 695 (1st Cir. 1981). An affidavit that relies solely on press accounts cannot be legally sufficient. Lastly, a careful examination of Judge Bason's letter in no way demonstrates a predisposition or bias in this case. This court, like the courts before it, can find no basis in fact to support a motion for recusal.

The events leading up to the government's motion for recusal occurred long after Judge Bason made his extensive bench rulings on liability which constitute the basis of his later memorandum opinion and order. Judge Bason made his oral ruling on the unlawful attempt to convert INSLAW's bankruptcy on June 12, 1987 and followed with a memorandum opinion on July 20, 1987. A bench ruling on DOJ's liability in the main adversary proceeding was

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("DOJ") in favor

announced on September 28, 1987, more than three and one-half months before the judge learned that he would not be reappointed. Although no written findings had been filed by the time Judge Bason learned that he would not be reappointed, the die had been cast. Government liability had already been assessed in no uncertain terms. The only untried part of the case that remained involved damages.

The government accuses the bankruptcy court of looking beyond the bankruptcy proceeding to find culpability by the government. What is strikingly apparent from the testimony and depositions of key witnesses and many documents is that INSLAW performed its contract in a hostile environment that extended from the higher echelons of the Justice Department to the officials who had the day-to-day responsibility for supervising its work. While the focus of the review must be on the actions taken by the Justice Department once INSLAW filed its petition for bankruptcy, the context of those actions cannot be fully appreciated without a thorough understanding of the underlying events and facts leading up to the bankrupcy.

The transcripts reveal that the bankruptcy judge kept close track of the evidence as it developed. This is reflected in frequent references to his notes, and his occasional questions to witnesses about what appeared to be critical evidence; and his attention to detail in both his oral and written rulings demonstrate a mastery of the evidence. This is apparent from the vast majority of the record citations in support of the various findings.

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It is not necessary to duplicate the bankruptcy court's exhaustive findings of fact here. It is sufficient to state that after careful review of all of the volumes of transcripts of the hearings before the bankruptcy court, the more than 1,200 pages of briefs and supporting appendices and all other relevant documents in the record, there is convincing, perhaps compelling support for the findings set forth by the bankruptcy court.

In accordance with the principles set out in Anderson v. Bessimer City, 470 U.S. 564, 571-75 (1985), the court has exami the bankruptcy judge's findings of fact in the light of the ent record, and finds that his account of the evidence is eminently plausible; and this court is not left with any notion that a "mistake has been committed." Id. at 574. This conclusion is reached without regard to the deference to be accorded to the judge's opportunity to assess credibility. The cold record adequately supports his findings under any standard of review. Accordingly the findings will not be disturbed.

With regard to the conclusions of law, the court believes that the facts support the multiple violations of the automatic stay that the bankruptcy court found. 11 U.S.C. § 362(a)(3) provides that "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" is a violation of the automatic stay.

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of

LAW, Inc.

ment of Justice ("DOJ") in favor

> the financial pressures that drove him into bankruptcy.

H. Rep. No. 595, 95th Cong., 1st Sess. 340-42 (1977).

It is not necessary to consider which party was entitled to the enhanced PROMIS software under INSLAW's contract with the Justice Department. At a minimum, the Department of Justice knew that INSLAW disputed the government's claim of ownership of enhanced PROMIS. It also knew that PROMIS represented INSLAW's principal asset and that without ownership of the software, the company's economic viability was threatened. Instead, of following the orderly procedures established by the bankruptcy code for resolving its dispute with INSLAW and seeking relief from the automatic stay, DOJ pursued a course of self-help. It claimed enhanced PROMIS to be its property and installed it in at least 45 offices throughout the United States. By these actions, DOJ violated the automatic stay.

See First Nat'l Bank of Portsmouth, New Hampshire v. Cope, 385 F.2d 404 (1st Cir. 1967). In that case a bank creditor held a secured interest in the debtor's automobile. For the purpose of deciding the case, the court assumed that the bank was legally entitled to repossess the car. Nonetheless, when the bank acted unilaterally and did repossess the car, the First Circuit held that its actions were unlawful. Although not addressing the automatic stay provision specifically, the First Circuit's insight appears to have application to this case.

> It should require but little imagination to envisage the serious consequences to orderly and, indeed, effective, bankruptcy administration that

, Inc. ... of Justice ("DOJ") in favor

would ensue from the recognition of the principle advocated by the bank. Every creditor who believed, albeit mistakenly that he had a right to property in the possession of the court, and perhaps some who did not believe it, but were willing to take the risk to improve their position, would seize that property. The trustee, instead of administering the estate, would be busy policing or endeavoring to regain possession of it. Particularly in a Chapter XIII proceeding, the whole purpose of which is to rehabilitate the debtor, the taking of assets vital to the conduct of his affairs might foreclose success. The requirement that even those who are correct in their belief that they are entitled to the return of property should have to go through orderly proceedings, In re Pappas, S.D. Ohio, 1962, 216 F. Supp. 819, and suffer consequences if they do not, is small price to pay.

385 F.2d at 406. See also In re Motley, 10 Bankr. 141 (Bankr.M.D.Ga. 1981) (creditor cannot exercise self-help; it must follow orderly procedures).

The court concurs with the bankruptcy court's conclusion that DOJ fraudulently obtained and then converted enhanced PROMIS to its own use. Prior to entering into Modification 12, INSLAW first proposed that DOJ be given the enhanced PROMIS for its use at no additional charge. After this proposal was rejected, INSLAW next proposed that a copy of the existing software be put in escrow which would become available to DOJ if INSLAW went out of business. Again, DOJ rejected INSLAW's proposal. It was not until INSLAW agreed to turn over its version of enhanced PROMIS that DOJ entered into Modification 12 and withdrew its threat of stopping the advance payments to INSLAW thereby averting a cash flow crisis that would have thrown the company into bankruptcy. These efforts to obtain a copy of the proprietary software were taken even though the government had yet to acquire the computer

Justice ("DOJ") in favor

hardware on which the software could run. These facts are not in dispute. Thus, the court is drawn to the same conclusion reached by the bankruptcy court; the government acted willfully and fraudulently to obtain property that it was not entitled to under the contract.

Once the software was in the possession of DOJ, there is no evidence that the government ever negotiated in good faith over the existence of the proprietary enhancements claimed by INSLAW. The DOJ put the entire onus of proof on INSLAW, yet never indicated what methodology or proof would be acceptable. The contract entered into by the parties entitled the government to the version of PROMIS then in the public domain. The expert witnesses demonstrate that INSLAW did enhance the software with private funds. The contract did not entitle DOJ to these enhancements. By failing to acknowledge or accept INSLAW's claims, the government continued its fraudulent behavior toward INSLAW. This behavior persisted long after INSLAW filed for reorganization. DOJ's actions constitute a violation of the automatic stay by exercising control over property that rightfully belonged to the estate.

With regard to the government's abortive attempt to convert Inslaw's reorganization into a liquidation, the court can think of no greater violation of the automatic stay than to cause the demise of the corporate entity.

The next issue raised by the government is whether the award of damages by the bankruptcy court was proper and within the court's authority. The bankruptcy court awarded monetary damages

vice ("DOJ") in favor

of $ 6.79 million for violations of the automatic stay regarding the unlawful conversion of PROMIS. In addition, monetary damages of one thousand dollars were assessed against the Justice Department for attempting to convert INSLAW's reorganization to a liquidation. The court declared that INSLAW was the sole owner of enhanced PROMIS and had the exclusive right to sell or lease the software; enjoined DOJ from further installing PROMIS in any more offices or from disseminating PROMIS to any person outside of DOJ; further enjoined three Justice Department officials from any future involvement with INSLAW or PROMIS; and, awarded attorneys' fees and costs.

Considering first the monetary damages and attorneys' fees issues, § 362(h) directs that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees." The bankrupty court estimated INSLAW's damages to be calculated in accordance with the perpetual license fees for the PROMIS software. The government contends that the calculation of license fees that INSLAW would have collected was not a proper measure of damages. DOJ claims that the effect of the court's order amounted to forcing the government to enter into a contract. Furthermore, the government argues that the license fees fail to measure the actual damage to INSLAW. According to DOJ, even if the bankruptcy judge was correct in using license fees to calculate actual damages, the fees overstate the value of INSLAW's actual harm.

Contrary to what the government contends, the bankruptcy court did not impose a contract upon the parties. Instead, the

Inc. ... Department of Justice ("DOJ") ... the United

trial court discharged its responsibility to assess damages based on the evidence adduced at trial. The bankruptcy court's conclusion is supportable based on the evidence in the record and as a matter of law. INSLAW proved to the satisfaction of the bankruptcy court the fair market value of its software by putting on experts versed in the valuation of software. Furthermore, other courts have held that license fees are an acceptable measure of damages in a variety of contexts.

Where the misappropriation of intellectual property has been the product of tortious conversion, license fees have been used to measure damages. See e.g. Compumarketing Serv. Corp. v. Business Envelope Mfgs., Inc., 342 F. Supp. 776, 778 (N.D.Ill. 1972) (usage fee for a mailing list converted by defendant is the measure of damages). Similarly, in cases involving patent infringement comparative royalties are accepted as a proxy. Clark v. Wooster, 119 U.S. 322, 326 (1886) (with regard to patent infringement, established license fees are the most reliable measure of damages); Leesona Corp. v. United States, 599 F.2d 958, 973 (Ct. Cl.), cert. denied, 444 U.S. 991 (1979). Where trade secrets have been misappropriated, license fees have again been used as the proper measure of damages. University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 535-45; reh'g denied, 505 F.2d 1304 (5th Cir. 1974); Vitro Corp. of America v. Hall Chem. Co., 292 F.2d 678, 683 (6th Cir. 1961). Thus, under a variety of legal settings, license fees have been used to calculate damages.

While the government makes several arguments to support its notion that the license fees overstate the value of the software

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to the government, only one merits further discussion. Twelve percent (12%) of INSLAW's standard license fees pay for the first year's maintenance charge of the software. Since the bankruptcy court did not force the parties to enter into a contract and there is no dispute that INSLAW never provided this service, the compensatory damage award should be reduced accordingly. By the court's calculation, twelve percent of the license fees amounts to $ 655,200. It is by that amount that the compensatory damages award should be reduced.

Finally, the government asserts that INSLAW is not entitled to attorneys' fees. Section 362(h) is clear in its mandate that any individual injured by a willful violation of the automatic stay "shall recover actual damages, including costs and attorneys' fees." 11 U.S.C. § 362(h). The bankruptcy court made an award under the statutory authority of both § 362(h) and the "bad faith" exception to the American Rule pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(b). See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (under the American Rule, each party must pay its own fees). DOJ counters that § 362(h) does not apply for corporations and that its conduct does not meet the bad faith test. As discussed previously, a corporation can collect actual damages for the violation of the automatic stay. Budget Service Co. v. Better Homes of Virginia, Inc., 804 F.2d at 292-93) ("bankruptcy courts acting through bankruptcy judges may enforce the sanctions of § 362(h) without reference to a finding of civil contempt"). Consequently, the bankrupcy court was correct in awarding attorneys' fees to

---ment of Justice ("DOJ").

INSLAW. There is no need to reach the question of whether the award was justified under the bad faith exception of 28 U.S.C. § 2412(b).

CONCLUSION

In conclusion, the court has determined that the bankruptcy court's orders of July 20, 1987 and January 25, 1988 regarding liability and damages against the United States for unlawfully violating the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362, by attempting to convert appellee's pending bankruptcy from a Chapter 11 reorganization to a Chapter 7 liquidation is AFFIRMED. The bankruptcy court's order of January 25, 1988 regarding liability of the United States for unlawfully violating the automatic stay provision of the bankruptcy code in phase I of the adversary proceeding (counts I, II and III) by exercising control over and proliferating the implementation of PROMIS is AFFIRMED. The bankruptcy court's order of February 2, 1988 regarding compensatory damages in phase I of the adversary proceeding (counts I, II and III) is MODIFIED in accordance with this memorandum so as to reduce the award by $ 655,200. Finally, the bankruptcy court's order regarding attorneys' fees in adversary proceeding No. 86-0069 is also AFFIRMED.

WILLIAM B. BRYANT
SENIOR UNITED STATES DISTRICT JUDGE

Date:

LAW, Inc.

---- (DOJ) in favor

STATEMENT OF THE FACTS AND THE NATURE OF THE CASE

INSLAW is a case-management software company founded and managed by William A. Hamilton and his wife Nancy. In an action brought in the United States Bankruptcy Court for the District of Columbia, INSLAW charged the Department with unlawfully attempting to destroy INSLAW and take over its case management software. In that action, the Court found that Department officials "took, converted, stole" INSLAW's software through "trickery, fraud, and deceit." Inslaw, Inc. v. United States, Ch. 11 Case No. 85-00070, Adv. No. 86-0069, slip op. at 9 (Bankr. D.D.C. Sept. 28, 1987). After subsequent hearings, the Court awarded INSLAW $6.8 million in damages. Inslaw, Inc. v. United States, Ch. 11 Case No. 85-00070, Adv. No. 86-0069, slip op. at 9 (Bankr. D.D.C. Feb. 1, 1988).

The Department appealed to this Court. This Court affirmed the Bankruptcy Court judgments, noting:

> It is sufficient to state that after careful review of all of the volumes of transcripts of the hearings before the bankruptcy court, the more than 1,200 pages of briefs and supporting appendices and all other relevant documents in the record, there is convincing, perhaps compelling support for the findings set forth by the bankruptcy court.

United States v. Inslaw, Inc., Ch. 11 Case No. 85-00070, Adv. No. 86-0069, slip op. at 37 (D.D.C. Nov. 22, 1989). The Court added that even the undisputed facts compelled it to draw "the same conclusion reached by the bankruptcy court; the government acted

willfully and fraudulently to obtain property that it was not entitled to under the contract." Id. at 40.

The Bankruptcy Court found that the Department's attempt to destroy INSLAW was manipulated by the Department's contract manager, a discharged INSLAW employee whose vindictiveness should have been curbed by his superiors. Later-discovered information points to an even uglier scheme in which friends of the then Attorney General sought to take advantage of their relationship with him in order to obtain a lucrative contract for the automation of the Department's litigating activities. INSLAW's case-management software was essential to this scheme, and to acquire it the conspirators resorted to unscrupulous means, up to and including "trickery, fraud, and deceit." Inslaw, Inc. v. United States, slip op. at 9 (decided Sept. 28, 1987). INSLAW submitted evidence of this scheme to the Department in February, 1988 and supplied corroborative information, much of it obtained from present and former Department employees, in May, 1989.

The Bankruptcy Court findings should in themselves have spurred the Department to take swift corrective action. It was foreseeable, however, that this would not only expose widely ramified criminal conduct on the part of Departmental employees but also make the Department liable for punitive and consequential damages much larger than the $6.8 million already awarded. The less the Department knew of the facts, the more easily it could rationalize the nonperformance of duty and minimize these risks. The Department could not completely duck an investigation, but it

might get away with a superficial one. Taking that chance, the Public Integrity Section of the Criminal Division initiated a cursory review of INSLAW's charges but made no serious attempt to determine their validity.

Respondents have a duty both to enforce the criminal laws and to be fair to civil litigants. It is scarcely conceivable that they will challenge this proposition. In opposing INSLAW's petition, they will thus be forced to argue that when the Public Integrity Section closed its so-called "investigation," the Section was acting within the scope of its discretion. This argument can be supported only on one of two grounds: either (1) that the facts alleged in INSLAW's petition are not true or (2) that these facts do not add up to a showing of wrongdoing sufficient to compel a thorough investigation. Neither contention is sustainable.

Respondents would be in a position to challenge the truth of INSLAW's allegations only if they had investigated them. At the very heart of INSLAW's petition, however, is the allegation that the Department has not made a serious effort to find out whether or not INSLAW's factual allegations are true. Corroborated as these allegations are by the testimony of the Department's own present and former employees, they will be difficult to overcome. For respondents to contend, on the other hand, that INSLAW's factual allegations are insufficient on their face to portray an abuse of discretion would trivialize both the Bankruptcy Court's findings of serious wrongdoing, which this

Court has affirmed, and the even more sinister malfeasance adumbrated by this petition and its attachments.

Being unable either to discredit INSLAW's allegations or to diminish their impact, the Department may then fall back on the assertion that the adequacy of its investigations, whether for the purpose of criminal prosecution or of civil litigation, is unreviewable as a matter of law. But that, as we shall point out below, is a position that has no support in the relevant cases.

The petition and its attachments lay out in detail the shortcomings of the Department's purported investigation. If the Department had done no more than match INSLAW's own investigative effort, it would have pursued the same leads that INSLAW pursued, identified the same individuals whom INSLAW interviewed, and obtained the same information that INSLAW obtained. The Department did not do any of these things. On the contrary, it wound up a superficial inquiry without contacting more than one of INSLAW's key witnesses, without following up any of the leads furnished to it by INSLAW, and without attempting to obtain the most obviously relevant documents and correspondence. Given these gross deficiencies, respondents cannot plausibly claim that they fulfilled either their duty to enforce the criminal laws or their duty of fairness in the conduct of civil litigation.

INSLAW does not contend that the facts it has assembled are sufficient to prove a criminal conspiracy. It does contend, however, that these facts, coupled with the Bankruptcy Court's findings, create an imperative need for a thorough, hardhitting,

and impartial investigation. Despite a great deal of time and expense devoted to developing a full explanation of the Department's malfeasance, INSLAW has not been able to pursue all the indicated leads, talk to all the available witnesses, or examine all the relevant documents. And even after the restraining order that prevented INSLAW from conducting discovery proceedings has been lifted, INSLAW still will not have means of obtaining critically important testimony anywhere near comparable to those at the command of the Department.

Against this background, the Department's statement of July 18, 1989 that its investigation had been terminated "due to lack of evidence of criminality" cannot be accepted at face value. The termination is better explained on the basis that the Department felt trapped by a conflict of interest. At the time of the statement the Civil Division was resisting INSLAW's claims on grounds which, had they been thoroughly investigated by the Criminal Division, might well have been found to be lacking in merit. The Department's duty to investigate the charges of a criminal conspiracy involving its own employees clashed with its interest in minimizing or defeating the civil damage claims against the Department. The Bankruptcy Court's findings and INSLAW's allegations impugned the Department's integrity. They implicated senior colleagues of the investigators themselves. Departmental pride was at stake. Rather than face the facts, it was easier to look for rationalizations such as `the evidence did not add up to the conclusive proof of crime,' `everybody does

favors for political friends,' or `the Hamiltons are suffering from a persecution complex.' As the Bankruptcy Court observed, respondents' reaction was "to circle the wagons." In re Inslaw, Inc., Ch. 11 Case No. 85-00070, Adv. No. 86-0069, slip op. at 1038 (Bankr. D.D.C. June 12, 1987).

Briefly stated, these are the circumstances under which INSLAW seeks from this Court a writ of mandamus directing respondents to conduct a fair and thorough investigation into the facts underlying the allegations contained in its petition and the attachments thereto. The legal basis for this request is set forth in the remainder of this memorandum.

U.S. 325, 349-50 (1939).

The distinction between the executive branch's duty to prosecute and the judicial branch's power to enforce observance of that duty was sharply delineated in Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974). Plaintiffs there sought a writ of mandamus to compel the Attorney General of the United States and the United States Attorney for the District of Columbia to initiate criminal prosecutions against alleged violators of the Federal Corrupt Practices Act. Although finding that the plaintiffs lacked standing, the Court of Appeals took issue with the District Court's conclusion that prosecutorial decision-making is wholly immune from judicial review and pointed out that mandamus is the appropriate remedy where "no legitimate consideration informed the prosecutor's decision not to prosecute the individual in question." Id. at 679 n.18.

No legitimate consideration informed respondents' decision not to investigate INSLAW's allegations. Accordingly, a writ of mandamus is the appropriate means of compelling respondents to fulfill the duties and responsibilities incumbent upon them as a matter of law.

II

INSLAW HAS A CLEAR RIGHT TO RELIEF

INSLAW's civil claims against the Department of Justice rest on the same evidence that points to the existence of a criminal conspiracy to destroy INSLAW and take over its software. The Department has defended itself against INSLAW's claims with

extraordinary zeal and tenacity. It continues to do so without ever having conducted an investigation of INSLAW's allegations sufficient to enable it to make a fair assessment of the merits of those claims, and thus to evaluate the extent of its potential liability to INSLAW.

As the next section of this memorandum makes clear, the Department had -- and still has -- a duty to conduct such an investigation. Insofar as it is a duty compelled by the obligation to be fair in the conduct of civil litigation, it is a duty owed to petitioner. Petitioner has been harmed by the Department's failure to fulfill this duty. INSLAW therefore has a clear right to relief, and thus satisfies the first requirement of entitlement to mandamus. See cases cited supra at 8-9.

The Department's neglect of its duty of fairness has harmed and continues to harm INSLAW in three clearly demonstrable ways: (1) it has forced INSLAW to expend substantial amounts of money and other corporate resources litigating its civil claims against the Department; (2) it has caused INSLAW to lose important business opportunities by delaying the vindication of INSLAW's performance under its contract with the Department; and (3) it has forced INSLAW to devote a vast amount of time, money, and energy to investigative efforts which the Department itself should have conducted and to which the Department could have brought far more adequate investigative resources. Indeed, the present situation entails a right to relief at least as compelling as those deemed sufficient in other cases involving a government agency's respon-

sibility toward a plaintiff's access to information. Cf. Ganem v. Heckler, 746 F.2d at 852-54 (on petition of non-resident Iranian, Secretary of Health and Human Services ordered to determine content of Iranian law for purposes of awarding Social Security benefits); American Friends Serv. Comm. v. Webster, 485 F. Supp. 222, 227 (D.D.C. 1980), aff'd in part and rev'd in part, 720 F.2d 29 (D.C. Cir. 1983) (FBI enjoined from destroying documents that might be relevant to plaintiffs' claims).

INSLAW's right to relief is reinforced by the criteria normally applied to standing in general. A party has standing if it alleges "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751, reh'g denied, 468 U.S. 1250 (1984). The economic harm suffered by INSLAW is itself sufficient to satisfy this requirement, as it "is beyond cavil that the deprivation of one's property is a sufficient injury to satisfy the injury in fact requirement." Cardenas v. Smith, 733 F.2d 909, 913 (D.C. Cir. 1984).

III

RESPONDENTS HAVE A CLEAR DUTY TO ACT

Article II, Section 3 of the Constitution directs the President to "take care that the Laws be faithfully executed." Although the statutes creating the position of Attorney General and making him head of the Department of Justice (28 U.S.C. §§ 503, 509) do not spell out his responsibilities, it has been

authoritatively declared that the Attorney General is "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offences [sic], be faithfully executed." Ponzi v. Fessenden, 258 U.S. 254, 262 (1922). See also United States v. Cox, 342 F.2d at 171. The Court in Ponzi traced the Attorney General's responsibility for the execution of laws to such venerable cases as Kern River Co. v. United States, 257 U.S. 147 (1921); In re Neagle, 135 U.S. 1 (1890); and United States v. San Jacinto Tin Co., 125 U.S. 273 (1888). This responsibility has been delegated to him by the President pursuant to the latter's "authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies." In re Neagle, 135 U.S. at 63.

The judicial precedents thus supply formal support for the universal assumption that it is respondents' duty to enforce the criminal laws of the United States and to represent the United States in civil litigation. This clear duty to act fulfills the second requirement of petitioner's entitlement to mandamus.

A. Respondents' Duty to Conduct Civil Litigation Embraces a Duty to Be Fair

Respondent's duty to see to it that the laws are faithfully executed carries with it a special obligation toward maintaining public confidence in the fairness of the administration of justice. In the words of the Supreme Court:

Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985), cert. denied, 475 U.S. 1048 (1986). In civil proceedings, mandamus can effectively serve the same end. See cases cited supra at 8-9.

Respondents' duty of fairness in the conduct of a lawsuit is more exacting than that expected of an ordinary litigant. Indeed, observance of this special degree of responsibility is expressly commanded by the Department of Justice Standards of Conduct. All Department of Justice employees are directed to "[c]onduct themselves in a manner that creates and maintains respect for the Department of Justice and the U.S. Government. In all their activities, personal and official, they should always be mindful of the high standards of behavior expected of them . . . ." Department of Justice Standards of Conduct, 28 C.F.R. § 45.735-2(a) (1988). Attorneys are also instructed to be guided in their conduct by the Code of Professional Responsibility of the American Bar Association. Id. § 45.735-1(b). The Code specifically speaks to the standard of fairness to be expected of government lawyers:

> A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

Code EC 7-14 (1989).

Respondents have "discretionary power relative to" the INSLAW litigation. Their responsibility to develop "a full and fair record" applies to the pretrial as well as to the trial stage of the litigation. Having failed to fulfill this responsibility, they are "continuing litigation that is obviously unfair." The Code of Professional Responsibility requires, therefore, that respondents make a serious effort to find out whether or not INSLAW's allegations are true, and this requirement is reinforced by the fact that respondents are in a far better position than INSLAW to do so. The unfairness that has resulted from the neglect of this responsibility is compounded by the continuing harm thereby imposed on INSLAW.

Given respondents' persistent refusal to take the action demanded by the duty of fairness, mandamus is the only practical means of redress.

B. Respondents' Duty to Enforce the Criminal Laws Embraces the Duty to Investigate

Referring to United States Attorneys, the Supreme Court has laid down standards that apply to all Federal prosecutors:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. at 88 (emphasis added). See also Young v. United States ex rel. Vuitton, 481 U.S. at 803; Marshall v. Jerrico, Inc., 446 U.S. 238, 249 (1980).

In order to see to it that "guilt shall not escape," respondents are obliged, whenever they initiate an investigation of wrongdoing, to pursue the evidence as far as may be necessary to make a proper determination as to the course of action thereby indicated. As this Court has said, a prosecutor "has an affirmative responsibility to investigate prudently suspected illegal activity when it is not adequately pursued by other agencies." NAACP v. Levi, 418 F. Supp. at 1115 (citing A.B.A. Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Part III (1974)).

Of course, respondents' duty to enforce the criminal laws is not a duty owed to INSLAW in the same degree that they owe INSLAW a duty of fairness in defending the United States against INSLAW's claims. That is a consideration, however, that bears only on the question of INSLAW's standing to seek mandamus, not on the question of the appropriateness of mandamus as a means of compelling respondents to carry out their duty to enforce the criminal laws through a proper investigation of INSLAW's allegations. Given INSLAW's standing in this Court to seek relief from respondents' unfairness in the civil litigation, the issue of their failure to enforce the criminal laws is also before the Court. Cf. Nader, supra, cited at 11; Levi, supra, cited at 8-9. If, therefore, this Court finds that they have been derelict in

this duty, it can properly order them to carry it out.

Respondents' duty to pursue the evidence in the matter of INSLAW has three separate components. The first consists in their obligation to decide upon the appropriate course of action. The Bankruptcy Court for this District found that "the Department of Justice took, converted, stole, INSLAW's enhanced PROMIS by trickery, fraud, and deceit . . . ." Inslaw, Inc. v. United States, slip op. at 9 (decided Sept. 28, 1987). This Court has affirmed that finding. United States v. Inslaw, Inc., slip op. at 44. INSLAW has adduced additional evidence of criminal conduct on the part of Department officials. These facts thrust upon respondents a duty to put aside concerns of institutional self-interest and follow the evidence wherever it may lead. Until and unless they do that, they cannot properly determine what action is necessary.

The second component derives from respondents' possession of a unique array of investigatory powers and resources. Respondents can, and INSLAW cannot, authorize electronic surveillance, initiate undercover operations, compel immunized testimony, rely on unsympathetic informants and accomplice witnesses, and call upon a grand jury's investigative powers. A Senate subcommittee which looked into the INSLAW situation learned that there were a number of DOJ employees "who desired to speak to the Subcommittee, but who chose not to out of fear for their jobs." Senate Comm. on Gov'tal Affairs, 101st Cong., 1st Sess., Allegations Pertaining to the Dep't of Justice's Handling of a

Contract With INSLAW, Inc. 58 at 46 (Comm. Print 1989). Only the Attorney General can assure these employees that their testimony will not bring reprisal. Moreover, the Department has under its direction trained and experienced investigators who have not been compromised by previous involvement in the INSLAW case. Possession of these powers and resources creates responsibility for their prudent but vigorous use.

The third component is a consequence of the impairment of INSLAW's ability to find the facts for itself which resulted from a court order denying it access to subpoena power and discovery proceedings for the 20-month period during which respondents' appeal from the Bankruptcy Court judgment was pending. The fact that respondents deliberately sought this blocking device augments their affirmative responsibility.

IV

INSLAW HAS NO OTHER ADEQUATE REMEDY

INSLAW has pursued, unsuccessfully, all the available administrative means of inducing the Department of Justice to perform its duty to conduct a fair and thorough investigation. INSLAW requested that the Attorney General appoint an Independent Counsel pursuant to the Ethics in Government Act. Respondents denied this request on May 4, 1988. INSLAW later asked the Special Division of the United States Court of Appeals for this Circuit, which is responsible for appointing Independent Counsels, to review this denial, but the Special Division found lack of

jurisdiction. In re INSLAW, Inc., Div. No. 89-2 (D.C. Cir. Sept. 8, 1989). Taking it for granted that the Department would conduct a bona fide investigation into the matter, INSLAW came forward with relevant information. Some of this information was submitted to the Public Integrity Section by the Hamiltons in February, 1988, and additional information was given to the Attorney General in May, 1989. The Department has ignored the leads supplied by INSLAW.

After the Public Integrity Section concluded its "investigation," it declined prosecution and closed the matter on July 18, 1989. INSLAW's counsel wrote the Department on August 10, 1989 complaining that this investigation had not been conducted in a thorough and impartial manner. The Department refused to reopen the matter.

Where, as a result of the exhaustion of administrative remedies, mandamus has become the only remaining source of relief, it is the appropriate remedy. See Ganem v. Heckler, 746 F.2d at 852-53; City of New York v. Heckler, 578 F. Supp. 1109, 1119 (E.D.N.Y.), aff'd, 742 F.2d 729 (2d Cir. 1984), reh'g denied, 755 F.2d 31 (2d Cir.), cert. granted, 474 U.S. 815 (1985), aff'd sub nom. Bowen v. City of New York, 476 U.S. 467 (1986); Caswell v. Califano, 435 F. Supp. at 132.

INSLAW has exhausted all available administrative remedies. It has no remaining source of relief. INSLAW has therefore satisfied the third and final requirement of entitlement to mandamus. See cases cited supra at 8.

Conclusion

For all the foregoing reasons, this Court should issue a writ of mandamus compelling respondents to conduct a fair and thorough investigation of the matters alleged by INSLAW in accordance with the conditions proposed in petitioner's prayers for relief.

Dated: Washington, D.C.
December 20, 1989

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INSLAW, INC.,	)	
	)	
Petitioner,	)	
	)	Civil Action No. 89-3443
v.	)	(WBB)
	)	
DICK THORNBURGH, as Attorney General of the United States, and UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Respondents.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS
INSLAW'S PETITION FOR A WRIT OF MANDAMUS

INTRODUCTION

Inslaw, Inc. petitions for a writ of mandamus to compel the Attorney General to conduct a criminal investigation of allegations that former high-level officials of the Department of Justice conspired to injure Inslaw and appropriate its software for their personal benefit. Respondents, the Attorney General and the United States Department of Justice, move to dismiss the petition under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the grounds that the Court lacks subject matter jurisdiction over Inslaw's claims and the petition fails to state a claim upon which relief can be granted.

The present petition is an offshoot of the extensive, ongoing litigation between Inslaw and the Department of Justice over a contract for the use of Inslaw's case management software in a number of U.S. Attorney's Offices. As this Court is aware, Inslaw has previously instituted a proceeding against the Justice

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Department in the U.S. Bankruptcy Court, in which it contends that officials within the Department violated the automatic stay entered at the time that Inslaw filed for reorganization under Chapter 11 of the bankruptcy code. Inslaw has also filed a series of claims before the Department of Transportation's Board of Contract Appeals ("DOTBCA") alleging that the Department has improperly withheld monies due Inslaw under the software contract between the parties. This new case focuses on Inslaw's claims that the actions allegedly taken by the Department to injure Inslaw were instigated by former top-level officials of the Department, who conspired for the purpose of appropriating Inslaw's software.

Inslaw's conspiracy theory is not raised here for the first time. It has been the subject of investigations by a Senate committee and the Criminal Division of the Department of Justice, both of which found no evidence to support Inslaw's allegations. Not satisfied with the results of these investigations, Inslaw now petitions for an extraordinary writ compelling the Justice Department to conduct a further review of Inslaw's allegations of criminal wrongdoing. Significantly, Inslaw not only seeks an order requiring the Attorney General to undertake an additional investigation of its claims, but also requests that respondents be directed to provide the Court with interim reports describing the progress of the investigation and a final report explaining its conclusion. Petition For a Writ of Mandamus ("Pet.") p. 15.

For the reasons discussed below, the Court need not reach the merits of Inslaw's allegations in order to deny the petition. Inslaw's lawsuit must be dismissed for several reasons. As an initial matter, the Court does not have subject matter jurisdiction over the petition because Inslaw lacks standing to compel the Attorney General to undertake an investigation of its claims. It is a well-settled principle of American law that a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another. See Linda R. S. v. Richard D., 410 U.S. 614 (1973). For that reason, an individual who is not personally subject to a criminal prosecution lacks standing to contest the decisions made by a prosecutor in connection with a criminal proceeding, including the decision not to undertake an investigation. Applying these principles to Inslaw's claim, it is apparent that Inslaw lacks standing because its alleged injuries are not fairly traceable to the Departmental decisions challenged here, nor will these injuries be redressed by the relief it seeks.

The Court lacks jurisdiction over Inslaw's claims for the additional reason that the decision of a prosecutor not to initiate or pursue a criminal proceeding has long been considered an unreviewable determination that is committed to the discretion of the Executive Branch. This principle applies a fortiori where the government has already conducted one investigation and a private citizen seeks to compel a further proceeding that is more to its liking.

Even if the Court concludes that it has jurisdiction to consider Inslaw's claims, the petition must nonetheless be dismissed because it fails to satisfy any of the elements for the issuance of the "drastic" and "extraordinary" remedy of a writ of mandamus. See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980). Inslaw cannot establish, as it must, that it has a "clear right" to the investigation it seeks; that the Justice Department has a "ministerial, plainly defined, and peremptory" duty to undertake such an investigation; and that it has no other adequate remedy, either judicial or administrative, to obtain relief. See Ganem v. Heckler, 746 F.2d 844, 852 (D.C. Cir. 1984); City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976). Inslaw offers no support for the proposition that the Justice Department has a ministerial duty to undertake an investigation at its request. To the contrary, the general duties of the Attorney General cited by Inslaw -- the "duty to be fair" and the duty to enforce the criminal laws -- do not in any way alter the traditional discretion of a prosecutor not to conduct a criminal proceeding.

Inslaw's request for relief must be rejected for the additional reason that it has ample alternative avenues of relief against the Department -- avenues that it is, in fact, actively pursuing. Not only has Inslaw already obtained substantial relief from this Court for its alleged injuries, but it is engaged in ongoing litigation against the Department in two separate forums. In particular, the proceeding before the

DOTBCA, which focuses on Inslaw's claims that the Department has improperly withheld monies due under the software contract, provides an appropriate context in which to address the question whether the contractual disputes were a "sham," engineered by high-level officials of the Department. Normal discovery procedures are available to Inslaw in that proceeding to pursue these allegations. An extraordinary writ should not serve as a supplemental discovery tool merely because Inslaw happens to be suing the Justice Department. Furthermore, to the extent that the relief sought here is designed to establish that the government is not defending in good faith the ongoing civil suits brought by Inslaw, those proceedings provide the appropriate forums in which to raise such claims.

Finally, the principle of separation of powers presents an especially compelling basis for denying Inslaw's petition. In dismissing prior efforts as inadequate and demanding an additional investigation, Inslaw seeks not only to compel a further review of its claims but also to control the nature and, implicitly, the result of any such proceeding. In particular, by requesting that the Justice Department be required to provide status reports to the Court regarding the progress and final results of the investigation, Inslaw is improperly attempting to convert this Court into a superprosecutor with an ongoing supervisory role over an Executive Branch proceeding. The petition must therefore be dismissed for the further reason that

it raises in a particularly acute form a conflict between the exercise of judicial and executive functions.

STATEMENT OF FACTS

1. The Pending Litigation Between Inslaw And The Department Of Justice.

Because this Court is familiar with the lengthy history of Inslaw's claims against the Justice Department, the relevant portion of that history is summarized here only briefly. The present petition follows substantial litigation between Inslaw and the Department of Justice over a contract for the use of Inslaw's case management software, known as the Prosecutor's Management Information System ("PROMIS"). Litigation between Inslaw and the Department stemming from this contractual relationship is presently pending in the U.S. Court of Appeals, the Bankruptcy Court, and the DOTBCA.

Inslaw first filed claims against the Justice Department in the Bankruptcy Court in June, 1986. See United States of America v. Inslaw, Inc., Ch. 11 Case No. 85-0070, Adv. Proc. No. 86-0069, slip op. at 9 (D.D.C., Nov. 22, 1989) (hereinafter "Mem. Op."). Inslaw claimed in that proceeding that the Department had violated the automatic stay imposed by the Bankruptcy Court when Inslaw filed for reorganization under Chapter 11 of the bankruptcy code. Id. at 9-10. In the summer of 1987, the Bankruptcy Court held hearings on the issue of whether the Justice Department had violated the automatic stay. Id. at 10. The Court reserved for later decision the question whether punitive damages could be awarded against the government. Id.

As part of the first phase of the bankruptcy proceeding, the Bankruptcy Court found that the Justice Department had violated the automatic stay. The court awarded Inslaw $ 6.79 million in compensatory damages, as well as over $ 1 million in attorneys' fees. After reducing the damages award by $ 655,200, on November 22, 1989, this Court affirmed the ruling of the Bankruptcy Court. The government filed a notice of appeal from these rulings on January 19, 1990.

In addition to the claims brought before the Bankruptcy Court, Inslaw filed claims against the Department of Justice before the DOTBCA in 1986 and 1987. Mem. Op. at 12-13. These claims relate specifically to the manner in which the software contract was administered. As previously described by this Court, Inslaw's claims before the DOTBCA relate to six different categories of payments allegedly due under the contract: (1) computer time-sharing charges associated with the computer center operated by Inslaw and used by several U.S. Attorney's Offices; (2) contract target fees and voucher payments withheld by the Justice Department and additional fees owed as a consequence of changes in the scope of work ordered by the Department; (3) indirect costs, including overhead; (4) directs costs; (5) costs incurred by Inslaw because of the termination for convenience of the word processing portion of the contract; and (6) costs incurred because the Justice Department withheld payments. Id. at 13. Discovery is now proceeding in the action before the DOTBCA.

2. Inslaw's Claims In This Proceeding.

Inslaw's present petition alleges the existence of a conspiracy among former high-level officials of the Justice Department and friends of former Attorney General Edwin Meese to injure Inslaw and appropriate its software for their own financial benefit. The petition describes a series of acts that Department officials allegedly took to harm Inslaw, including threats to withhold contractual payments unless Inslaw provided the Department with proprietary enhancements to the original PROMIS software, and a series of "sham" contract disputes that were allegedly fabricated as a pretext for withholding money due Inslaw under the contract. Pet. ¶¶ 6-7. In addition, Inslaw alleges that attempts were made by several private companies to acquire Inslaw.[1] Pet. ¶ 11. The petition asserts, on information and belief, that these attempts to acquire control of Inslaw were "linked by a conspiracy among friends of Attorney General Meese" to obtain a "lucrative contract" relating to the computerization of the Department's litigating divisions. Id. ¶ 12. Among the facts allegedly pointing to the existence of this conspiracy are longstanding relationships between former Attorney General Meese, former Deputy Attorney General D. Lowell Jensen, and the controlling shareholder of a computer software

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[1] The petition refers to an offer by Hadron, Inc., a software company "controlled by a long-time friend of Edwin Meese" to buy Inslaw; an attempt by a New York-based venture capital firm to induce Inslaw's owners to turn over their voting rights in Inslaw's common stock; and a hostile takeover bid for Inslaw, made with the "encouragement" of DOJ officials, by a Pennsylvania-based computer services company. Pet. ¶ 11.

company; and allegations made by an unidentified Justice Department employee in 1983 that Mr. Jensen, now a United States District Judge, was behind an effort to "get" or "bury" Inslaw. Id.

Prior to the filing of the present lawsuit, the conspiracy claims that underlie Inslaw's petition were investigated on two separate occasions. Between April 1988 and September 1989, the Staff of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs conducted a detailed investigation of Inslaw's claims of a conspiracy reaching into the "upper echelons" of the Justice Department. See Staff Study on the Permanent Subcommittee on Investigations' Inquiry of the INSLAW Matter, U.S. Senate Committee on Governmental Affairs (September 29, 1989) (hereinafter "Staff Study") at 16.[2] In the course of this investigation, the Staff reviewed "tens of thousands of pages of documents," interviewed or deposed "over 50 individuals,"[3] and served document and deposition subpoenas on

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[2] The Senate Staff investigated a large volume of factual material presented by William Hamilton, the owner of Inslaw, of which only a condensed version appears to have been included in the Affidavit attached as Exhibit B to the mandamus petition. The Staff Report states that, at various times during the investigation, the Staff received allegations and information from Mr. Hamilton in "telephone conversations, personal meetings, and written memoranda." Staff Report at 22 n. 1. Finally, in February, 1989, Mr. Hamilton supplied the Staff with a two-volume compilation of his claims, entitled "The Basic Hypothesis, Redacted Version" and "Detailed Summary of Facts and Authorities in Support of the Basic Hypothesis, Redacted Version." Id.

[3] These persons included:

bankruptcy officials; current and former

(continued...)

numerous witnesses, including employees of the Department of Justice. Staff Study at 21. The Staff prepared an 80-page report which describes in detail the results of this extensive investigation. The Report states that "[a]fter an extensive investigation, the Staff found no proof of a conspiracy within the Department of Justice, or between the Department and outside parties, to force INSLAW into bankruptcy for the financial or personal benefit of Department officials or outside parties." Staff Study, Summary at 4.[4]

The allegations underlying the mandamus petition have also been investigated previously by the Justice Department. Beginning in February, 1988, representatives of Inslaw presented their conspiracy claims to the Public Integrity Section of the Department's Criminal Division. Pet. ¶ 15. The Public Integrity Section is the office within the Justice Department that is responsible for investigating and prosecuting claims of

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[3](...continued)
Justice Department employees; representatives of Inslaw; Congressional Staff members; former and present GAO personnel; AT&T employees; Los Angeles County, California, employees; Alameda County, California, employees; former and present employees of Hadron, Inc.; Dickstein, Shapiro, & Morin law firm partners; sitting U.S. District Court judges; and various others.

Staff Study at 21.

[4] Among its detailed conclusions, the Staff found no proof that Edwin Meese, D. Lowell Jensen or other Justice Department officials were involved in a conspiracy to ruin Inslaw or steal its product. Staff Study at 22-27. Nor did the Staff find any proof that employees of Hadron, Inc. conspired with officials of the Department to acquire Inslaw's assets. Id. at 28-30.

corruption by elected and appointed public officials. On May 4, 1988, officials of the Section advised Inslaw that it would investigate certain of these charges. Id. ¶ 16. On July 18, 1989, the Section notified Inslaw that it had completed its investigation of Inslaw's allegations and that "prosecution has been declined, due to lack of evidence of criminality." Id. Inslaw also asked the Justice Department to appoint an independent counsel under the Ethics in Government Act to investigate its charges. Id. ¶ 19. That request was denied on May 4, 1988. Id. The Special Division of the Court of Appeals denied Inslaw's appeal from this decision for lack of jurisdiction. In re: Inslaw, Division for the Purpose of Appointing Special Counsels, Division No. 89-2 (D.C. Cir., Sept. 8, 1989), at 4.[5]

Inslaw's allegations of wrongdoing were also considered by the Senate during hearings to confirm the appointment of D. Lowell Jensen as United States District Judge for the Northern District of California. In the course of the hearings, Mr. Jensen responded to detailed questions regarding his role in the administration of the Inslaw contract. See Staff Report at 7-8 and Appendix B thereto. Mr. Jensen's appointment was

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[5] The court noted that, upon receipt of Inslaw's request for the appointment of an independent counsel, the Department of Justice "promptly conducted a thorough review of the allegations in conformance with the Independent Counsel Act." In re: Inslaw, Division for the Purpose of Appointing Special Counsels, Division No. 89-2 (D.C. Cir., Sept. 8, 1989), at 4.

subsequently confirmed. Id.[6] The Staff of the House Judiciary Committee is also currently considering Inslaw's claims.

Despite this prior review of its allegations, Inslaw now seeks a writ of mandamus to compel the Justice Department to conduct a further investigation of its conspiracy claims and to provide the Court with periodic reports regarding the progress and results of such an investigation. For the reasons discussed below, the petition must be dismissed for lack of subject matter jurisdiction and because it fails to satisfy any of the elements for the issuance of a writ of mandamus.

ARGUMENT

I. THE COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER INSLAW'S PETITION.

A. Inslaw Lacks Standing To Compel The Government To Undertake A Further Investigation Of Its Conspiracy Claims.

Article III of the Constitution limits the jurisdiction of federal courts to actual "cases or controversies". Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). To satisfy this constitutional requirement, a plaintiff must establish that it has "standing" to challenge the action sought to be adjudicated.

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[6] In addition, during the hearings to confirm the appointment of Arnold Burns to succeed Mr. Jensen as Deputy Attorney General, Mr. Burns provided assurances that he would familiarize himself with the Inslaw matter, consider the possibility of an amicable settlement, and take precautions to ensure that similar controversies were avoided in the future. Id.

Id. The Supreme Court has held that the principles of standing require a litigant to satisfy the following criteria:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision' . . . . In this manner does Art. III limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'

Id. at 472 (citations and footnotes omitted). See Allen v. Wright, 468 U.S. 737, 751 (1984); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41 (1976).

As the Supreme Court has observed, "the law of Art. III standing is built on a single basic idea -- the idea of separation of powers." Allen v. Wright, 468 U.S. at 752. "The exercise of the judicial power . . . affects relationships between the coequal arms of the National Government." Valley Forge, 454 U.S. at 473. This effect is "most vivid" when a federal court invalidates "an act of the Legislative or Executive Branch." Id. For that reason, the invocation of such power "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals." Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892). See also Allen v. Wright, 468 U.S. at 752; Valley Forge, 454 U.S. at 473-74.

Applying these principles to this case, Inslaw has not met its burden of pleading and proving the three elements of standing identified by the Supreme Court in Valley Forge. While petitioner alleges that it has suffered various forms of harm, the injuries identified are not fairly traceable to the Department's alleged failure to investigate fully Inslaw's conspiracy claims. Nor are these injuries "likely to be redressed" by the relief Inslaw seeks in this proceeding.

1. Inslaw Has Not Articulated Any Injury That Is Fairly Traceable To The Nature Of The Investigation Conducted By The Department.

The discussion of standing contained in the memorandum of law accompanying Inslaw's petition is limited to the question whether petitioner has suffered injury-in-fact as a result of the government's alleged failure to conduct a "thorough" investigation of Inslaw's claims. See Memorandum of Law in Support of Inslaw's Petition for a Writ of Mandamus ("Pet. Mem.") at 13. The forms of injury Inslaw alleges, however, are plainly not attributable to the nature of the investigation conducted by the Department.

Petitioner contends that the lack of an "adequate" investigation has injured it in the following respects: (1) it has forced Inslaw to expend resources in pursuing civil litigation against the Justice Department; (2) it has delayed "vindication" of Inslaw's performance under its contract with the Department and has therefore caused Inslaw to lose business opportunities; and (3) it has required Inslaw to spend its own

time and money investigating its claims against the Justice Department. Pet. Mem. at 12; Pet. ¶ 18. By any reasoned analysis, however, it is clear that these injuries stem from Inslaw's underlying contractual dispute with Department officials, not from the government's alleged failure, years later, to conduct a "thorough" investigation. Inslaw's decision in 1986 to bring civil suits against the Department, as well as the burdens imposed by that litigation, were prompted by actions that are entirely distinct from the subsequent decisions made by the Department in response to Inslaw's request for a criminal investigation.

In a similar challenge to a nonenforcement decision, this Court dismissed a complaint for lack of standing because the injury alleged by the plaintiff was not traceable to the government's decision not to prosecute certain crimes. In McCollum v. Smith, 596 F. Supp. 165 (D.D.C. 1984), the plaintiffs contended that, because of the Justice Department's alleged policy of refusing to prosecute persons who committed violent racial crimes, they had been subjected to criminal acts by members of the Ku Klux Klan. The court held that the causal link between the plaintiffs' injury and the defendants' enforcement decisions was too speculative to confer standing to sue the Department. While acknowledging that the plaintiffs had indeed been injured, the court explained that "the appropriate inquiry is whether these defendants' actions have caused that injury. . .

. The Court can find no such causal link here." Id. at 167-68 (emphasis in original).

Similarly, in this case, the burdens allegedly suffered by Inslaw in pursuing its civil claims against the Department cannot fairly be attributed to governmental enforcement decisions taken long after the alleged contract disputes that prompted Inslaw's suits. As the Supreme Court has held in an analogous context, "[c]ertainly the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing, is absent in this case." Linda R. S. v. Richard D., 410 U.S. 614, 618 (1973).

2. The Relief Requested In This Proceeding Will Not Redress Inslaw's Alleged Injuries.

Inslaw also fails to satisfy the redressability prong of the standing requirement. This defect in its claim is illustrated by the long line of cases holding that a private citizen lacks standing to compel a government official to prosecute the alleged perpetrator of a crime. As the Supreme Court stated in the leading case of Linda R. S. v. Richard D., 410 U.S. at 619 (citations omitted):

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.

See also Maine v. Taylor, 477 U.S. 131, 137 (1986); Diamond v. Charles, 476 U.S. 54, 64 (1986); Sure-Tan, Inc. v. NLRB, 467 U.S.

883, 897 (1984) (private parties have no judicially cognizable interest in prosecution or nonprosecution of another).

In Linda R. S., the Supreme Court explained the reasons for this rule of nonjusticiability. In that case, the mother of an illegitimate child sought a declaratory judgment that a Texas statute, which made it a crime for parents not to provide child support, was being enforced in a discriminatory manner to apply only to married parents. The Supreme Court held that the plaintiff did not have standing to challenge the application of the statute because she had not established a sufficient nexus between her injury and the relief that the court could provide. The Court concluded that:

> if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.

Id. at 618.

The Supreme Court has applied this principle to deny review even when the victim of an alleged crime contests a prosecutor's decision not to pursue a criminal proceeding. In Leeke v. Timmerman, 454 U.S. 83 (1981), the Supreme Court relied on Linda R. S. to hold that inmates who had been beaten by prison guards lacked standing to compel a prosecutor to issue an arrest warrant against the guards. The Court reasoned that:

> there is no guarantee that issuance of the arrest warrant would remedy claimed past misconduct of guards or prevent future misconduct. Even if a prosecution could remedy respondents' injury, the issuance of

> an arrest warrant in this case is simply a prelude to actual prosecution. Respondents concede that the decision to prosecute is solely within the discretion of the prosecutor. It is equally clear that issuance of the arrest warrant in this case would not necessarily lead to a subsequent prosecution.

Id. at 86-87 (emphasis in original). See Dohaish v. Tooley, 670 F.2d 934 (10th Cir.), cert. denied, 459 U.S. 826 (1982); McCollum v. Smith, 596 F. Supp. 165 (D.D.C. 1984).

The Court of Appeals has relied on these principles to deny standing to a litigant who raised claims remarkably similar to those of Inslaw. In Community for Creative Non-Violence v. Pierce, 786 F.2d 1199 (D.C. Cir. 1986), the plaintiffs requested the United States Attorney to investigate their allegations that officials of the Department of Housing and Urban Development had engaged in a "criminal coverup" concerning the validity of an agency report. After the request for an investigation was denied, the plaintiffs moved to disqualify the United States Attorney's Office from representing HUD in civil litigation over the challenged report, arguing that the Office's participation created a conflict of interest. In denying the plaintiffs' motion on standing grounds, the court noted that, had the plaintiffs directly challenged the government's decision not to conduct an investigation, they would have confronted "an unbroken line of explicit precedent" denying them standing to contest the policies of a prosecuting attorney. Id. at 1201, citing Linda R. S. v. Richard D., 410 U.S. 614, 619 (1973), and Leeke v. Timmerman, 454 U.S. 83 (1981). As the court explained:

> The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws; when reviewing the exercise of that power, the judicial authority is, therefore, at its most limited. . . . <u>That authority is non-existent in cases such as the one posited here, because 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'</u> <u>Linda R.S.</u>, 410 U.S. at 619.

<u>Id</u>. (emphasis added; citations omitted).

In a discussion that is particularly relevant to this case, the Court of Appeals also rejected the plaintiffs' theory of redressability. The court noted that, if the requested investigation took place, the following chain of events might ensue:

> [i]f an investigation . . . followed and if the United States Attorney found that a HUD official had committed perjury in defending the report, then, presumably that finding would, in one way or another, advance appellants' civil suit.

<u>Id</u>. at 1202. This analysis exactly mirrors Inslaw's own contention of how it would benefit from a governmental investigation here, namely that a "thorough" investigation of its claims would uncover wrongdoing by Department officials that would, in turn, lead the Department to withdraw its opposition to Inslaw's civil claims. <u>See</u>, <u>e</u>.<u>g</u>., Pet. Mem. at 12, 17. However, the Court of Appeals found that this theory of redressability was "even more speculative and less 'direct'" than that rejected by the Supreme Court in <u>Linda R. S.</u>, and accordingly denied the plaintiffs' motion.

As the reasoning of Community for Creative Non-Violence v. Pierce reflects, it is entirely speculative whether a further investigation of Inslaw's conspiracy claims will serve to advance its position in the ongoing civil suits or otherwise remedy its alleged injuries. Indeed, the negative conclusions of the prior investigations underscore the speculative nature of Inslaw's claim that further review will eliminate whatever harm it has suffered. The petition must therefore be dismissed for failure to satisfy the redressability element of the standing requirement.

Prudential considerations also compel dismissal of Inslaw's petition on standing grounds. Inslaw asks not only that the Court order a further investigation of its conspiracy claims, but also that the Justice Department be required to submit periodic reports to the Court regarding the progress of the investigation and a final report at the conclusion of the inquiry. Thus, every stage of the investigation -- including the witnesses called, leads followed, and documents reviewed -- would be subject to judicial review. If granted, this relief would transgress the traditional separation of judicial and executive roles. As the Supreme Court has explained, however, the principle of separation of powers:

> counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial

> Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3. We could not recognize respondents' standing in this case without running afoul of that structural principle.

Allen v. Wright, 468 U.S. at 761 (footnote omitted). See also Winpisinger v. Watson, 628 F.2d 133, 140 (D.C. Cir.), cert. denied, 446 U.S. 929 (1980) ("The judiciary is not to act as a management overseer of the Executive Branch"). That analysis is equally applicable here where petitioner seeks to have the Court exercise prosecutorial powers vested by the Constitution in the Executive Branch. Accordingly, for this reason as well, Inslaw's petition must be dismissed for lack of standing.[7]

B. The Separation of Powers Doctrine Deprives The Court of Jurisdiction To Review The Attorney General's Decision Not To Investigate Or Prosecute Alleged Crimes.

The Court lacks subject matter jurisdiction over Inslaw's petition for the additional reason that the decision of a prosecutor not to undertake a criminal investigation is an unreviewable determination that is committed to the discretion of

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[7] Inslaw as much as concedes that it lacks standing to compel the Attorney General to conduct a criminal proceeding. See Pet. Mem. at 18. In an analysis that is less than clear, however, Inslaw argues that it does have standing to challenge the Department's "unfairness in the civil litigation," and that the Court may properly consider the government's alleged failure to enforce the criminal laws together with that claim. Id. However, Inslaw offers no legal support for the proposition that the Court may overlook a defect in standing by bootstrapping one claim onto another. Furthermore, any "unfairness" that Inslaw alleges the government has been guilty of in the separate civil suits would more appropriately be raised in those proceedings rather than through a criminal investigation.

the Executive Branch. Inslaw's action is therefore foreclosed by the constitutional doctrine of separation of powers.

The Constitution vests the executive power of the government in the President (Art. II, Sec. 1) and makes it his duty to "take Care that the Laws be faithfully executed" (Art. II, Sec. 3). The Attorney General has been given the responsibility for conducting litigation on behalf of the United States (see 28 U.S.C. § 516), including the power to conduct criminal litigation. Criminal law enforcement, including a prosecutor's decision not to indict, "has long been regarded as the special province of the Executive Branch." Heckler v. Chaney, 470 U.S. 821, 832 (1985). Over a century ago, the Supreme Court observed that "[p]ublic prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the [United States] district attorney . . . ." Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1869). See United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). As the Supreme Court has explained, this principle is particularly appropriate when a prosecutor decides not to take enforcement action, since the coercive power of the state over individual liberty and property is not implicated under those circumstances. Heckler v. Chaney, 470 U.S. at 832.

mandamus to compel an investigation or prosecution of allegedly unlawful acts. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973); Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970) (per curiam); Powell v. Katzenbach, 359 F.2d 234; Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965); Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961). See also Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868).

The reasons for this rule of nonreviewability are many. As the Court of Appeals has observed, "[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings." Newman v. United States, 382 F.2d at 480. "[T]he manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision." Inmates of Attica Correctional Facility, 477 F.2d at 380. "Nor is it clear what the judiciary's role of supervision should be were it to undertake such a review." Id. The different variables that influence the prosecutor's judgment, including "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." Wayte v. United States, 470 U.S. 598, 607 (1985). See Heckler v. Chaney, 470 U.S. at 831-32.

For these reasons, the constitutional doctrine of separation of powers has been held to preclude judicial review of a prosecutor's decision not to initiate a criminal proceeding. See, e.g., Inmates of Attica Correctional Facility, 477 F.2d at 379-80; United States v. Cox, 342 F.2d at 171. See also Heckler v. Chaney, 470 U.S. at 832. This doctrine provides a particularly strong reason to deny relief here, where Inslaw's petition seeks not only to compel the Executive to undertake an investigation but also to have the Court, through periodic progress reports, provide ongoing monitoring of the manner in which an Executive function is conducted. Inslaw's petition must therefore be dismissed for lack of jurisdiction.

II. INSLAW'S PETITION FAILS TO SATISFY ANY OF THE ELEMENTS REQUIRED FOR THE ISSUANCE OF A WRIT OF MANDAMUS.

Even if the Court concludes that it has jurisdiction to consider Inslaw's claim, the petition must nevertheless be dismissed for failure to state a claim upon which relief can be granted. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." Allied Chemical Corp. v. Daiflon, 449 U.S. 33, 34 (1980). See Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953); Barnhart v. Devine, 771 F.2d 1515, 1524 (D.C. Cir. 1985); In re GTE Service Corp., 762 F.2d 1024, 1026 (D.C. Cir. 1985). A party seeking such relief must establish that its right to mandamus is "'clear and indisputable.'" Bankers Life & Casualty Co., 346 U.S. at 384. Accord Mallard v. United States District Court, 109 S. Ct. 1814,

1822 (1989); Allied Chemical Corp. v. Daiflon, 449 U.S. at 35. Inslaw satisfies none of the elements for the issuance of a writ of mandamus, and its petition must therefore be dismissed.

A writ of mandamus will issue only if three criteria are met. The petition must establish that "there is a clear right in the plaintiff to the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, available." Ganem v. Heckler, 746 F.2d 844, 852 (D.C. Cir. 1984). See Heckler v. Ringer, 466 U.S. 602, 616-17 (1984). Inslaw's petition does not satisfy any of these requirements.

A. The Justice Department Does Not Have A "Plainly Defined and Nondiscretionary Duty" To Conduct An Additional Investigation Of Inslaw's Claims.

Mandamus is an appropriate remedy only when it is invoked to compel an act that is a "positive command, so plainly prescribed as to be free from doubt." Pattillo v. Schlesinger, 625 F.2d 262, 265 (9th Cir. 1980). The duty in question must be "ministerial, plainly defined, and peremptory." City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976), quoting McGaw v. Farrow, 472 F.2d 952, 956 (4th Cir. 1973). See United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931) ("The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable"). Inslaw has no "clear right" to compel the government to undertake an investigation of allegedly criminal acts. To the contrary, as discussed above,

the decision whether or not to undertake a criminal investigation has traditionally been regarded as a purely discretionary determination. This principle applies with particular force where the government has already conducted one investigation and a member of the public seeks to have it conduct another, under court supervision.

1. The "Duty Of Fairness" And The "Duty To Enforce The Criminal Laws" Do Not Create A Ministerial Obligation To Undertake Special Investigations At The Request Of The Public.

For the reasons discussed above (at pp. 21-25), the courts have traditionally held that the decision of a prosecutor not to conduct an investigation is unreviewable. The Court of Appeals has suggested that the only situation in which a court might be empowered to compel an enforcement proceeding would be where "Congress has withdrawn all discretion from the prosecutor by special legislation." Powell v. Katzenbach, 359 F.2d at 235.[9] Cf. Heckler v. Chaney, 470 U.S. 821 (agency decision not to bring enforcement action presumptively unreviewable except where "substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers"). However, Inslaw points to no law that "alter[s] the traditional scope of the prosecutor's discretion." Powell, 359 F.2d at 235. The only

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[9] Another situation in which judicial review of prosecutorial decisions has been permitted is when an actual prosecution has commenced. Once a prosecution has been formally initiated, the subject of the proceeding is entitled to challenge his or her prosecution on a variety of constitutional or procedural grounds. See Wayte v. United States, 470 U.S. 598, 608 (1985); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

legal grounds it offers in support of its right to relief are the Justice Department's "duty to be fair" in the conduct of civil litigation and the Attorney General's "duty to enforce the criminal laws." Pet. ¶ 17. These duties, however, plainly do not impose a ministerial obligation, i.e. "one in respect to which nothing is left to discretion,"[10] on the Justice Department to undertake a criminal investigation at Inslaw's request.

Petitioner contends that the government's "duty of fairness toward citizens with whom they are engaged in litigation" obligates the government to conduct a further investigation of Inslaw's charges. Pet. ¶ 17. In an attempt to give substance to this manifestly indeterminate duty, petitioner relies on the Department of Justice's Standards of Conduct, 28 C.F.R. § 45.735-2(a), and the Code of Professional Responsibility of the American Bar Association. Pet. Mem. at 16-17. By no stretch of the imagination, however, can these standards be considered to create a ministerial duty on the government's part to undertake a special, court-supervised investigation at the request of their adversaries in civil litigation. Moreover, to the extent that Inslaw believes that the Justice Department's defense of its civil suits has not proceeded in good faith -- a concern that appears in large part to have prompted its petition (see Pet.

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[10] National Treasury Employees Union v. Nixon, 492 F.2d 587, 607-08 (D.C. Cir. 1974), quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 498 (1867).

subject to review for arbitrariness or abuse of discretion. As the Court of Appeals observed in Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967):

> It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.

In rejecting a similar argument, the Court of Appeals for the Second Circuit explained that subjecting an individual decision not to prosecute to review for abuse of discretion or lack of good faith would conflict with the very reasons for which such decisions have traditionally been considered unreviewable. Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380-81 (2d Cir. 1973). Because of the "manifold imponderables" that enter into such a decision, the "task of supervising prosecutorial decisions do[es] not lend [itself] to resolution by the judiciary." Id. at 380.

Inslaw's argument is also directly inconsistent with the Supreme Court's ruling in Heckler v. Chaney, 470 U.S. 821 (1985), in which the Court held that the decision of an executive agency not to take enforcement action is presumptively unreviewable under the Administrative Procedure Act except where Congress has, in the agency's governing statute, provided substantive standards to control the exercise of the agency's discretion. Under Heckler, decisions by a federal agency not to take enforcement action (and a fortiori comparable decisions by a federal

prosecutor) may be reviewed only if they conflict with a substantive legal requirement, not where a plaintiff alleges that the decision is "arbitrary" or "contrary to the public good." See Pet. ¶ 25. In the context of a mandamus petition, the burden is even greater since the petitioner must identify a substantive law that not only limits the exercise of discretion but also creates a duty that is "ministerial, plainly defined, and peremptory," City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976). Inslaw has not done so here.[13]

2. The Cases Cited By Inslaw Do Not Support Its Right To Relief.

Inslaw offers no case support for the proposition that the duties it cites impose a peremptory obligation on the government to investigate its claims. Rather, it describes the "components" of the government's purported duty in terms of the benefits Inslaw would receive, as the plaintiff in the bankruptcy and DOTBCA proceedings, from a governmental investigation of its conspiracy claims. Pet. Mem. at 19-20. These alleged benefits consist primarily of the information that might be developed through the use of the "unique array of investigatory powers and

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[13] Inslaw relies on dictum from Medical Committee for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972), in support of its position that the Justice Department's decision may be reviewed for arbitrariness. That decision is not apposite, however, since it involved the reviewability of a decision by the SEC not to require a corporation to include certain language in a proxy statement, not the decision of a prosecutor in a criminal proceeding. That decision also pre-dates the controlling ruling in Heckler v. Chaney regarding the appropriate standards for review of agency enforcement decisions.

resources" available to the government. Id. at 19. Such benefits, however, do not create a "clear right" to relief in Inslaw, much less a "plainly defined and nondiscretionary duty" on the government's part to act. Criminal investigations are not intended to serve as an additional discovery device for civil litigants who are suing the Justice Department. Like any other litigant, Inslaw may use the discovery devices available to it in the underlying civil litigation to support its claims; the fact that it might benefit from a governmental investigation, however, does not create a peremptory right to such a proceeding.[14]

Petitioner cites no case in which a court has ordered the federal government to conduct a criminal investigation of a particular violation of law. Its reliance on Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974), and NAACP v. Levi, 418 F. Supp. 1109 (D.D.C. 1976), is misplaced since both of those cases involved

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[14] Inslaw identifies as a particular reason why it is entitled to mandamus relief the fact that it has been precluded by an Order of this Court from conducting discovery regarding its claims in the bankruptcy proceeding. Pet. Mem. at 20. That Order, however, is in effect only during the pendency of the appeal from the Bankruptcy Court's rulings. Furthermore, Inslaw is free to take discovery in the DOTBCA proceeding, which is the appropriate forum for resolving its claims arising out of its contract with the Department.

Inslaw is also incorrect in contending that the Justice Department "deliberately" sought an order blocking discovery in the bankruptcy proceeding. Pet. Mem. at 20. The Order staying proceedings in the Bankruptcy Court was entered by the District Court in response to Inslaw's motion to withdraw the reference of its claims to the Bankruptcy Court, not upon motion by the government. While the United States believes that the Stay Order is a proper exercise of the Court's discretion, if Inslaw contends that the Order is improper, its remedy is to apply to the Court to have it lifted.

challenges to Departmental prosecution policies rather than individual enforcement decisions. In Nader v. Saxbe, the plaintiffs challenged an alleged Justice Department policy not t bring prosecutions under the Federal Corrupt Practices Act. The Court of Appeals dismissed their claims for lack of standing. Id. at 680-82. The court addressed the question of prosecutoria discretion only in dicta, noting that judicial review was not "necessarily" foreclosed where a challenge was made to a governmental policy of nonenforcement. Id. 679. However, the court reaffirmed the rule that judicial review is inappropriate where, as in Inslaw's situation, the court is asked "to assume the essentially Executive function of deciding whether a particular alleged violator should be prosecuted." Id. at 679.

In NAACP v. Levi, 418 F. Supp. 1109 (D.D.C. 1976), dism'd, 76 F.R.D. 134 (D.D.C. 1977), the district court relied on the dicta in Nader v. Saxbe to deny a motion to dismiss a challenge

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15 In a lengthy footnote, the panel in Nader recognized that "[t]he federal courts have customarily refused to order prosecutions of particular individuals at the instance of priva parties." Id. at 679 n. 18 (citations omitted). It also noted that, to mandamus a particular prosecution, a court would have engage in a "very difficult" evaluation of the numerous factors influencing the prosecutor's decision. Id. It concluded:

> That the balancing of these permissible factors in individual cases is an executive, rather than a judicial function follows from the need to keep the courts as neutral arbiters in the criminal law generally . . . and from Art. II, § 3 of the Constitution, which charges the President to "take Care that the Laws be faithfully executed."

Id. (citations omitted). Accordingly, the reasoning of the pa undercuts rather than supports Inslaw's petition.

criminal an alleged Justice Department policy of deferring to state investigations in cases alleging violations of constitutional and civil rights by state officials. Id. at 1113, 1116-17. Relying on the distinction drawn in Nader between challenges to individual decisions not to prosecute and governmental policies of nonenforcement, the district court permitted the action to proceed because it was a challenge to a "general policy" of nonenforcement. Id. at 1117. The court recognized the principle stated in Nader, however, that the question whether a particular prosecution should proceed is an "essentially Executive function." Id. at 1116.[16] See also NAACP v. Meese, 615 F. Supp. 200, 204 n. 12 (D.D.C. 1985) (rejecting contention that prosecution policy more subject to review than decisions relating to individual prosecutions).

Petitioner contends that its claim presents "at least as compelling" a basis for mandamus relief as that involved in other cases in which such relief has been granted. Pet. Mem. at 9. However, none of the cases cited by Inslaw in this regard involved the exercise of prosecutorial discretion. Moreover, by illustrating the clearly defined legal duty that is necessary to support mandamus relief, these cases merely underscore the weakness in Inslaw's claim. For example, in Roaring Springs

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16 NAACP v. Levi was subsequently dismissed when the Department of Justice revised its policy regarding prosecution of alleged civil rights violations by state officials. 76 F.R.D. 134. As the court noted, the issuance of the new Departmental memorandum satisfied "the policy objectives which underlie this suit." Id. at 135 (emphasis added).

sociates v. Andrus, 471 F. Supp. 522 (D. Ore. 1978), the plaintiff sought a writ of mandamus to compel the Department of the Interior to remove free-roaming horses from his property. The writ was issued on the basis of a federal statute that explicitly provided that:

> If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshall . . . who shall arrange to have the animals removed. . . .

Id. at 524. See also Caswell v. Califano, 435 F. Supp. 127 (D. Me. 1977) (Social Security Act and Administrative Procedure Act compel Secretary of HEW to conduct eligibility hearings for social security disability benefits within specified time period); McNutt v. Hills, 426 F. Supp. 990 (D.D.C. 1977) (Rehabilitation Act requires agency to provide prospective employment relief to handicapped employee). No comparable "plainly defined and nondiscretionary duty" is present here. See Ganem v. Heckler, 746 F.2d at 852.

B. Petitioner Has Alternative Means Of Obtaining Relief From The Justice Department.

Inslaw's petition must be denied for the additional reason that it has adequate, alternative remedies to pursue its claims against the Justice Department without the issuance of an extraordinary writ. See Ganem v. Heckler, 746 F.2d at 852. The ongoing litigation between Inslaw and the Justice Department before the DOTBCA squarely raises the question of the validity o the contract disputes over Inslaw's software. That proceeding

therefore provides an appropriate forum in which to pursue a legally sufficient claim that the disputes over the software contract were instigated in bad faith by Departmental higher-ups. For that reason, a writ of mandamus is not necessary to enable Inslaw to pursue its claims against the Department or to obtain relief, if warranted.

Inslaw contends that it is entitled to mandamus relief because it has no other means of compelling the Justice Department to investigate its claims. Pet. ¶ 19. However, the proper question is not whether Inslaw has any other means of requiring a Departmental investigation but whether it has any alternative means of pursuing its claims that it has been injured by the actions of former high-level government officials. Clearly, it does have such an alternative means through its pending civil litigation. Indeed, because that litigation provides the only avenue by which Inslaw may obtain any direct relief for its conspiracy claims (see standing discussion at pp. 16-20 supra), it is manifestly the preferable forum in which to raise such claims.

Inslaw has appealed six disputes to the DOTBCA relating to the software contract between the parties. Its claims relate, inter alia, to disputed computer timesharing charges associated with the computer center operated by Inslaw and used by several U.S. Attorney's Offices; contract target fees and voucher payments withheld by the Department; direct and indirect costs; and costs incurred by Inslaw due to the termination for

nience of the word processing portion of the contract. Mem. *at 13.* The question whether additional monies are due Inslaw under the contract relates directly to the validity of the contractual disputes between the parties. Since Inslaw alleges that these disputes were a sham (Pet. ¶ 7) -- and one of the primary means by which the Justice Department attempted to injure its business -- the DOTBCA proceeding provides the proper forum in which to pursue the issue of whether these disputes were "concocted" in bad faith by high-level officials. Id.

Full discovery is available to Inslaw in the DOTBCA proceeding to pursue issues relating to the administration of the contract. See 48 C.F.R. §§ 6302.18-19,.24 (1988). While Inslaw wishes to obtain the advantages of the "unique array of investigatory powers and resources" available to the government (see Pet. Mem. at 19), it has no right, any more than any other party to litigation against the Department, to obtain these extraordinary devices as a substitute for civil discovery. Cf. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (Freedom of Information Act not intended to function as "private discovery tool" in place of normal discovery procedures).[17]

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[17] Inslaw's own actions establish that it believes it is entitled to pursue its conspiracy claims against high-level officials in the pending civil litigation. In fact, as the exhibits to the mandamus petition illustrate, Inslaw has already addressed the role of Departmental higher-ups in the bankruptcy proceeding. See, e.g., Findings of Fact and Conclusions of Law of the Bankruptcy Court, ¶¶ 271, 312, 313, 320, Exhibit A to Petition (describing involvement of D. Lowell Jensen in contract disputes).

(continued...)

As the Court of Appeals has observed, it is "elementary that mandamus is an extraordinary form of relief which lies only when no adequate alternative remedy exists." Barnhart v. Devine, 771 F.2d 1515, 1524 (D.C. Cir. 1985). See In re GTE Service Corp., 762 F.2d 1024, 1027 (D.C. Cir. 1985). Mandamus is restricted to "exigent circumstances" where alternative forms of relief are unavailable. Cartier v. Secretary of State, 506 F.2d 191, 199 (D.C. Cir. 1974), cert. denied, 421 U.S. 947 (1975). Alternative remedies justifying denial of the writ include those that may be issued in either judicial or administrative proceedings. Id.; Fox v. Harris, 488 F. Supp. 488, 492-93 (D.D.C. 1980).

In this case, the pending civil litigation between the parties provides an adequate alternative means for Inslaw to pursue any legally sufficient claims it may have against the Department. In fact, the proceeding before the DOTBCA provides preferable context for Inslaw's claims since it is the only foru in which Inslaw may directly obtain relief for its claims, assuming arguendo that they are found to have merit. In addition, this alternative forum would permit Inslaw's claims to

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[17](...continued)
Inslaw has also asserted in papers filed before the DOTBCA that its claims of bad faith misconduct by Department officials in the administration of the contract will be litigated as part of Phase III of the bankruptcy proceeding. Response of Appella Inslaw, Inc. To DOJ's Motion To Set A Date And Response And Objections To DOJ's Second Set of Discovery, at 9-10, U.S. Department of Transportation Board of Contract Appeals. While the government contends that this issue is not relevant to the bankruptcy proceeding and should be raised before the DOTBCA instead, Inslaw evidently intends to attempt to pursue this aspect of its claims before the Bankruptcy Court.

considered "in a manner potentially less destructive of the overall allocation of powers" between coordinate branches of government than would the remedy sought here. See Cartier v. Secretary of State, 506 F.2d at 200. Accordingly, Inslaw is not entitled to the extraordinary relief it seeks in this proceeding.

CONCLUSION

For the preceding reasons, the Petition for a Writ of Mandamus should be dismissed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, on this 26th day of February, 1990, I caused to be served by first-class mail, postage prepaid, a copy of Respondents' Motion to Dismiss Inslaw's Petition for a Writ of Mandamus, the accompanying Memorandum of Points and Authorities, and a proposed Order upon counsel for petitioner:

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DEPARTMENT OF TRANSPORTATION
BOARD OF CONTRACT APPEALS

CLIN/IMO-02

APPEALS OF INSLAW, INC. UNDER CONTRACT NO. JVUSA-82-C-0074	DOTBCA NOS. 1609, 1673, 1775, 1828

INSLAW, INC.'S MOTION TO COMPEL THE DEPARTMENT OF JUSTICE TO MAKE PAYMENT PENDING RESOLUTION OF DISPUTES, TO REMAND TO AN INDEPENDENT CONTRACTING OFFICER FOR A NEW FINAL DECISION, AND TO DISMISS WITHOUT PREJUDICE

Pursuant to Rule 7(a)(6) of the Department of Transportation Board of Contract Appeals ("Board") Rules of Procedure, INSLAW, Inc. ("INSLAW" or "appellant") moves to compel the Department of Justice ("DOJ" or "respondent") to pay INSLAW's claims pending resolution of disputes, to remand these appeals to an independent contracting officer in another agency for a proper final decision to be issued within sixty (60) days of completion of the current Defense Contract Audit Agency ("DCAA") audit, and to dismiss these appeals without prejudice.1/

1/ INSLAW has pledged to remove issues of bias and bad faith from these proceedings, wherein government contracts cost questions should be the only issues. As discussed infra, this motion presents the only way to completely eliminate issues of bias and bad faith. Over the course of this litigation, it has become increasingly apparent that, absent the relief sought herein, these issues will continue to surface.

I. INTRODUCTION

Litigation between the parties in the U.S. Bankruptcy Court provides a compelling factual background to support this motion. In In re Inslaw, Inc., 83 B.R. 89 (Bankr. D.D.C. 1988), Judge Bason made extensive and detailed findings of fact regarding the relationship between INSLAW and the DOJ during performance of Contract No. JVUSA-82-C-0074 (the "contract"). These findings show conclusively that INSLAW did not receive proper final decisions in this case due to the bias and lack of independence of the contracting officer. The Board has recognized that these findings are res judicata on these appeals. Inslaw, Inc., DOTBCA Nos. 1609, 1673, 1775, 1828, 89-1 BCA ¶ 21,238 at 107,117 ("The Bankruptcy Court having made the determination that bias existed, that determination is res judicata on the matters so determined and must be accepted by this and other tribunals"). Additionally, the U.S. District Court for the District of Columbia recently affirmed the Bankruptcy Court opinion, and, in so doing, concluded that Judge Bason's findings of fact were correct "without regard to the deference to be accorded to the judge's opportunity to assess credibility. The cold record adequately supports his findings under any standard of review." United States v. Inslaw, Inc., No. 85-0070, slip op. at 37 (D.D.C. Nov. 22, 1989) [emphasis added.] See Appendix A.

Respondent has withheld and continues to withhold funds from INSLAW based on decisions made by a contracting

officer whom two federal judges have found to be wholly biased and lacking in independence. In addition, the contracting officer's final decisions heavily relied on audits that the Board has determined to be untrustworthy. INSLAW, Inc., 89-1 BCA ¶ 21,238 at 107,117. It is illogical, unfair, and a subversion of the government contracts disputes process for respondent to continue withholding funds under these circumstances. Respondent should make full payment to appellant of all amounts due and owing under the contract, with interest. If and to the extent that the new audit ordered by this Board and a subsequent final decision by a new contracting officer conclude that sums are due to respondent, there will be time enough for respondent to make its claim, for INSLAW to appeal, and for the Board to consider the issues. INSLAW requests only what is fair and reasonable given the unique facts of this case -- full payment of its claims pending the outcome of these disputes.

Accordingly, INSLAW also requests that these appeals be dismissed without prejudice and remanded to an independent contracting officer in another agency for a proper final decision -- if in fact disputes exist after the new audit is completed. Until such time INSLAW should be paid all amounts properly due under the contract.

INSLAW has affirmatively pledged not to make the bias or bad faith of any DOJ personnel an issue in these appeals. INSLAW reaffirms that pledge today, and files this motion so that the Board may effectively and permanently remove bias, bad

faith, or any other motivational issues from the disputes. The only disputes before this Board should be disputes involving questions of government contracts costs. Such cost questions can be resolved much more efficiently and expeditiously if extraneous motivational issues are removed. However, despite the findings by two federal courts of bias and bad faith in the actions of the contracting officer, respondent continues to seek additional information regarding those issues through discovery in these proceedings. It is apparent that motivational issues will continue to slow down the disputes resolution process -- and make the process needlessly expensive -- so long as the judicially discredited contracting officer's final decisions remain the basis of the Board's jurisdiction.

The Board, in fact, ordered a new audit in order to remove any taint of bias and bad faith from the cost data at issue in these disputes. The Board should similarly remand these appeals to ensure that these "red herring" issues are completely and effectively removed from the entire disputes process. Not only do fairness and judicial efficiency call for this remand, but also the law clearly gives INSLAW the right to obtain a proper final decision from an independent and impartial contracting officer. INSLAW, therefore, respectfully requests that the Board dismiss these appeals without prejudice and remand them to an independent contracting officer for a proper final decision to be issued within sixty days of the issuance by DCAA of an audit report for the current audit.

The harms resulting from the failure of DOJ to carry out its duty to issue a proper final decision fall on INSLAW, a company just emerging from bankruptcy. First, INSLAW continues to be denied use of funds withheld on the basis of contracting officer decisions found by two federal judges to be biased and lacking in independence. Second, INSLAW -- and respondent -- are continually forced to address issues of bias and bad faith that can and should be removed from the disputes process. These efforts are not only needlessly expensive, but also detract from the ability of the parties to concentrate on resolving the cost issues, which should be the sole issues of dispute in this forum. Therefore, to end the continuing drain on INSLAW's resources, INSLAW respectfully requests the Board to grant the remedies sought herein.

II. FACTS[2/]

Respondent appointed C. Madison Brewer as project manager for the contract. As project manager, Mr. Brewer was responsible for staffing the positions to administer the

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2/ The following factual recitation consists solely of Bankruptcy Court findings entitled to res judicata effect. INSLAW does not present the facts to argue for their acceptance by the Board; res judicata principles make that unnecessary. Moreover, INSLAW does not present these facts to argue for a particular resolution of the contract disputes. Rather, the facts are raised to demonstrate (1) that the contracting officers's final decisions form an inadequate basis for respondent to continue withholding payments on INSLAW's claims; and (2) that the contracting officer's final decisions form an inappropriate basis for the Board to continue exercising jurisdiction in these appeals.

contract. (Finding of Fact ("FOF") 124.)[3/] Mr. Brewer was familiar with INSLAW since he was a former employee. INSLAW terminated Mr. Brewer's employment with it for "failure to perform his job duties and responsibilities." (FOF 104.) Due to this prior relationship with INSLAW, Mr. Brewer was "consumed by hatred for and an intense desire for revenge against Mr. Hamilton [INSLAW's President] and INSLAW, and acted throughout this matter in a thoroughly biased and unfairly prejudicial manner toward INSLAW." (FOF 110.) He applied for and accepted the position of project manager so that he could "vent his spleen against INSLAW." (FOF 125.) Mr. Brewer was in a position to significantly influence Peter Videnieks, the contracting officer, since he depended on Mr. Brewer for his "professional livelihood and advancement." (FOF 133.) Mr. Brewer, therefore, had the ability and opportunity to disrupt INSLAW's performance, as well as its financial well being.

Mr. Brewer greatly influenced Mr. Videnieks' actions. Specifically, Judge Bason found that Mr. Videnieks was dependent on others, including Mr. Brewer, "in all areas about which he had to make decisions as the contracting officer." Id. The opinion noted a witness' description of Mr. Videnieks as Mr. Brewer's "puppet." Id. Especially significant here is Judge Bason's finding that Mr. Videnieks failed in his duty as

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3/ "FOF" citations correspond to the court's numbered findings of fact from In re Inslaw, Inc., 83 B.R. 89 (Bankr. D.D.C. 1988).

a government contracting officer to be detached and independent from the disputes. Id. Judge Bason noted that Mr. Videnieks was "infected by Brewer's poisonous attitude" towards INSLAW and actually "aided and assisted Brewer in his wrongful efforts to injure INSLAW." (FOF 137.) In summarizing his findings, Judge Bason wrote that Mr. Videnieks "was thoroughly affected by Brewer's bias" and "acted at the bidding of Brewer." (FOF 398(1).)

INSLAW has pledged that it will not re-litigate motivational issues in these appeals.4/ These issues, in fact, have no place in these disputes, particularly since the Board has already stated that the findings of the Bankruptcy Court have a res judicata effect on any future findings of fact by the Board. Respondent, however, refuses to let these issues die, and continues to pursue these issues in discovery. See Appendix B. Unless this motion is granted, the parties will

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4/ Mr. Hamilton stated in an affidavit that "INSLAW's sole assertion [regarding bias] . . . has always been that the interpretations by the Contracting Officer of those audit figures were affected by bias." (Hamilton Affidavit, pg. 4, ¶ 9, included in INSLAW's Memorandum of Points and Authorities in Support of INSLAW's Motion for Reconsideration dated April 28, 1989.) He added that "INSLAW further states unconditionally that it will not in this proceeding raise any issue of whether the actions of DOJ with respect to Contract 0074 were taken in bad faith." (Hamilton Affidavit, pg. 4, ¶ 11.)

INSLAW does not now raise such issues, but merely refers to findings of the Bankruptcy Court -- which have been recently affirmed by the District Court -- in order to demonstrate the need for the Board to effectively and permanently remove motivational issues from the contract disputes resolution process.

continue to waste time and money to address issues which have already been the subject of res judicata findings by the federal courts. To allow these issues to remain in these disputes will only obscure and delay resolution of the central issues of cost allowability -- assuming that legitimate issues of cost allowability exist after completion of a proper audit and issuance of an unbiased contracting officer's final decision.

III. DISCUSSION

A. DOJ Should Pay INSLAW's Claims Pending the Outcome of These Disputes

The Board should order DOJ to pay INSLAW's claims immediately in order to stop the financial hardship that DOJ has forced on INSLAW. By failing to properly perform his duties, Mr. Videnieks unfairly deprived INSLAW of payments for its services, and thus forced INSLAW into bankruptcy. In his final decisions, he denied all of INSLAW's claims regardless of their validity. Mr. Videnieks based his decisions upon DOJ audits that respondent -- by virtue of its request for a DCAA audit -- is no longer willing to rely upon, and that the Board has found so untrustworthy as to justify a new audit.

Respondent has used the disputes process to have its cake and eat it too. It has not paid a cent on INSLAW's claims using, as justification, the decisions of a discredited contracting officer and audits which the Board finds untrustworthy and which respondent refuses to rely upon. At

the same time, DCAA is conducting a new audit which is forcing INSLAW to expend scarce resources -- thus putting additional financial pressure on INSLAW.

INSLAW is now asking the Board to return fairness to this process. The Board has already recognized the patent inaccuracy of Mr. Videnieks' decisions, at least with regard to computer center costs. INSLAW, Inc., 89-1 BCA ¶ 21,238 at 107,118 n.7 (all computer costs disallowed "although patently there must have been some costs incurred"). Certainly, the Board does not have to make a great leap of faith to assume, given the conclusions of the federal courts, that the contracting officer would and did disallow other legitimate costs that INSLAW incurred during performance.5/ As a result of ignoring INSLAW's legitimate claims, Mr. Videnieks' actions had an immediate and adverse effect on the financial well-being of INSLAW. The actions deprived INSLAW of payments for its services, thus preventing INSLAW from paying its employees and suppliers and forcing INSLAW into bankruptcy.

INSLAW believes that the Board has the power to grant this request given the unique circumstances of this case. In

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5/ Of the costs disallowed in Mr. Videnieks' decisions, only 32.4 percent were even questioned in DOJ audits. Moreover, most of the portion questioned involved computer center costs, which were completely disallowed although the Board recognizes that such costs clearly were incurred. Id. Virtually all remaining costs specifically addressed in the DOJ audits -- 67.4 percent -- were not questioned, but were considered by the DOJ auditors to be unresolved. Rather than attempt to resolve the cost issues raised, Mr. Videnieks summarily disallowed everything, forcing INSLAW to litigate.

the very least, urge respondent to pay INSLAW in light of the clear findings of two federal courts. See also Virginia Electronics Co., Inc., ASBCA No. 22933, 78-2 BCA ¶ 13,416 (board urged payment of a tenative settlement on quantum pending appeal to the Court of Claims).

It is especially disturbing that respondent continues to withhold sums due INSLAW based on audits that the Board finds worthy of little weight, INSLAW, Inc., 89-1 BCA ¶ 21,238 at 107,117, and upon which respondent is no longer willing to rely as it, through DCAA, is conducting another expensive and time consuming audit of the contract. Despite this insufficient basis for withholding payments, respondent continues to do so. Given the depth and breadth of respondent's resistance to treating INSLAW fairly, respondent will, if permitted, undoubtedly withhold the money that it owes INSLAW until every avenue of appeal is exhausted. INSLAW's unique situation cries out for the relief that it asks for in this motion, specifically full payment under the contract pending resolution of any cost disputes.

(Footnote Continued)

Furthermore, in Fidelity Construction, this Board pointed out that the Contract Disputes Act ("CDA"), enacted after the issuance of Hanger One, did not change its authority in this area. 80-2 BCA ¶ 14,819 at 73,140. Thus, assuming arguendo that the Board lacks authority to order payment, it certainly has the authority to strongly urge it, and it should exercise that authority here.

B. The Contracting Officer Has The Obligation To Issue An Impartial And Independent Decision On INSLAW'S Claims. The Contracting Officer Clearly Failed To Carry Out This Duty And INSLAW Now Requests That A New, Independent Contracting Officer From Another Agency Issue A Final Decision On Its Claims

The record clearly shows that the contracting officer did not issue a single fair and independent decision in this case. The law requires the contracting officer to render such a decision. INSLAW has been and continues to be harmed by the failure of the contracting officer to issue fair and independent decisions. INSLAW, therefore, requests what the law requires and what it did not receive -- a proper final decision.

1. A Contracting Officer Has a Duty to Act Impartially and Consequently, He Alone Must Issue a Decision

It is well-settled that a contracting officer is charged with the duty to act fairly and impartially in rendering a final decision. Since only the contracting officer is charged with this duty, only he can issue a final decision. For this reason, the boards and courts have long held that the contracting officer must issue a personal and independent final decision. In the instant case the contracting officer clearly failed in his duties to act impartially and to render personal and independent decisions.

The Court of Claims and the boards have recognized that the contracting officer has a duty to act impartially

because, when he is considering claims, he serves in a quasi-judicial capacity. Space Age Engineering, ASBCA No. 26028, 82-1 BCA ¶ 15,766 at 78,033-34. The Court of Claims has long recognized that the contracting officer "must not act as a representative of one of the contracting parties, but as an impartial, unbiased judge."7/ Penner Installation Corporation v. United States, 89 F. Supp. 545, 547, aff'd, 340 U.S. 898 (Ct. Cl. 1950). If the contracting officer fails to execute this duty properly, the decision is devoid of finality and may be set aside. Id. In Husky Oil NPR Operations, Inc., IBCA Nos. 1871, 1865-70, 1890-1900, 85-1 BCA ¶ 17,901, the Interior Board found that the contracting officer's failure to act impartially destroyed the finality of the decision. The Board therefore remanded the case to the contracting officer for a proper final decision. Id. at 89,644. In the instant case, Mr. Videnieks clearly did not act impartially as he was "infected by Brewer's poisonous attitude towards INSLAW." (FOF 137.) As in Husky Oil, the Board should remand this case for issuance of an independent and impartial contracting officer's final decision.

A contracting officer must also render his decisions personally and independently in order to insure that the

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7/ Although not in effect at the time of contracting, the current Federal Acquisition Regulations ("FAR") are quite explicit about the contracting officer's responsibilities in this regard. Contracting officers shall "ensure that contractors receive impartial, fair, and equitable treatment." FAR § 1.602-2(b). INSLAW received partial, unfair, and inequitable treatment by Mr. Videnieks.

contractor receives a fair and impartial decision. Earl B. Bates Nursery, IBCA No. 368, 1963 BCA ¶ 3738 at 18,666. The contracting officer is bound by the contract to personally decide the validity of the contractor's claims. New York Shipbuilding Corp. v. United States, 385 F.2d 427, 435 (Ct. Cl. 1967) (parties intend for the contracting officer to "put his mind to the problems and render his own decisions").8/ More recently, this Board succinctly stated that the contractor is entitled to an independent decision of the contracting officer "as a matter of law." G.S. & L. Mechanical & Construction, Inc., DOTBCA No. 1856, 87-2 BCA ¶ 19,882 at 100,579.

Boards have expressed special concern regarding the influence of superiors on the contracting officer's decision. It is "vital to the process to restrain even the subtle influence of superiors." Edmund Leising Building Contractor, Inc., VACAB No. 1428, 81-1 BCA ¶ 14,925 at 73,853 (dispute remanded to the contracting officer for an independent final decision). In this case, the Bankruptcy Court's findings show that the influence of Mr. Videnieks' superiors was anything but "subtle." Mr. Videnieks was so influenced by his superiors that he failed to maintain even the appearance of impartiality in issuing the decisions on INSLAW's claims.

8/ In New York Shipbuilding the Court of Claims did not remand the case to the contracting officer. However, that case involved a motion to dismiss by the government for failure to exhaust administrative remedies. Any failure to exhaust such remedies was caused by the government. The instant case is clearly distinguishable because INSLAW, the party who has been wronged, seeks an appropriate remedy.

The effect of the failure of the contracting officer to issue a personal and independent decision is to render that decision a nullity. New York Shipbuilding, 385 F.2d at 436. Here, the Bankruptcy Court specifically found that Mr. Videnieks failed to act independently in issuing final decisions. Judge Bason discussed the duty to act independently and how Mr. Videnieks failed to fulfill that duty. Judge Bason concluded that, "Videnieks was not acting like a Government contracting officer in that he was not independent from the disputes. . . ."; also, Mr. Videnieks did not fulfill his responsibility to act in a "statesmanlike manner, somewhat 'above the fray.'" (FOF 133.) Therefore, Mr. Videnieks' decisions are nullities which have no effect. INSLAW should be paid, with interest, all amounts withheld by DOJ as a result of those decisions. Any claims outstanding after completion of the current DCAA audit should be addressed by an impartial contracting officer in an independent agency.

Respondent may argue that Mr. Videnieks simply relied on the advice of others, as he is entitled to do, but that he issued his own decision. Indeed, courts have drawn a distinction between rendering an independent decision and receiving the advice of others. Jacob Schlesinger, Inc. v. United States, 94 Ct. Cl. 289 (1941). Such argument, however, would be inconsistent with the findings of the Bankruptcy Court. Mr. Videnieks did much more than consider the advice of experts. He acted "at the bidding" of Mr. Brewer. He could

not possibly have been blind to the inequitable treatment of INSLAW, but his lack of independence permitted it to happen.

Boards, in appropriate circumstances, remand cases due to the contracting officer's failure to render a personal and independent decision. See, e.g., Byrd Foods, Inc., VABCA No. 1679, 83-1 BCA ¶ 16,313; Edmund Leising Building, 81-1 BCA ¶ 14,925; J.E. Peters, Inc., ASBCA No. 4198, 57-2 BCA ¶ 1375. See also Husky Oil, 85-1 BCA ¶ 17,901 at 89,644 (appeals dismissed and remanded when the contracting officer's decision "falls short of the impartiality and quasi-judicial attitude required of the contracting officer"). It is difficult to imagine a case where a remand is more appropriate than this one. Here, where it has been judicially determined that the contracting officer's decisions were fatally deficient, the Board should not rely on these very decisions as a basis for continued exercise of its jurisdiction. The Board should exercise its discretion to remand the appeals to a new contracting officer in another agency for a proper and independent final decision.

2. The Contract Disputes Act and the Contract Require a Proper Decision by the Contracting Officer

A proper final decision by the contracting officer is essential to the disputes resolution system mandated by Congress in the Contract Disputes Act. A major purpose of the CDA is to resolve disputes as quickly and efficiently as possible. The CDA, therefore, continues the time-honored

practice of having contractors' claims submitted to the contracting officer for a final decision prior to appeal to the boards or the courts. Without impartial and independent final decisions, the purpose of the CDA is undermined since the pre-board or pre-court stage denigrates into a bureaucratic hoop necessary before a fair hearing. See New York Shipbuilding Corp., 385 F.2d at 435:

> [W]e shall not today sanction an erosion of responsibility by holding that it makes no difference whether or not the [contracting] officer does his work. Similarly, the existence of boards of contract appeals should not be used to weaken the contracting officer's (the initial decider's) obligation. The appellate hearing may be de novo, but a proper and conscientious first decision is still important -- it may go for the contractor and thus obviate the need for an appeal . . . .

[Emphasis added.] INSLAW is entitled to a proper contracting officer's final decision in this case, as in any other government contract or in any other case.

The Court of Claims has recognized the importance of the contracting officer's decision, terming it the "linchpin" of the CDA. Paragon Energy Corp. v. United States, 645 F.2d 966, 967 (Ct. Cl. 1981). The CDA expressly outlines the role that the contracting officer's decision plays in the disputes process and provides certain minimum requirements for the decision. 41 U.S.C. § 605 (1982). The CDA clearly requires a decision by the contracting officer, and not by another government employee. Id.

This requirement of the CDA is not new. Courts and boards have long interpreted the final decision of the contracting officer as a bargained for contractual right which the government cannot delegate, supersede or ignore. This Board recently stated:

> It is well-settled that when a contractor is entitled to a decision of the contracting officer, it is entitled to the independent decision of that contracting officer. [Citation omitted.] The parties have contracted in the expectation of the contracting officer personally exercising his or her discretion in rendering that decision.

G.S. & L. Mechanical & Construction, Inc., DOTBCA No. 1856, 87-2 BCA ¶ 19,882 at 100,579. See also John A. Johnson Contracting Corp. v. United States, 132 F. Supp. 698, 705 (Ct. Cl. 1955) (contract entitled contractor to decision by contracting officer, not his superior). Thus, the CDA simply continues a long-established policy whereby contracting officers are required to issue independent and impartial decisions on contractor claims.

The intent of Congress in enacting the CDA was to have contractor claims "resolved by mutual agreement, in lieu of litigation, to the maximum extent possible." 124 Cong. Rec. 18,641 (1978). A proper final decision by the contracting officer is essential for successful implementation of this policy. OFPP regulations, issued after Congress passed the CDA and in effect at the time the subject contract was executed, underscore the importance of the contracting officer's proper

exercise of his duties. "It is the Government's policy, consistent with the Act, to try to resolve all claims by mutual agreement at the contracting officer's level, without litigation." OFPP Policy Letter 80-3, 45 Fed. Reg. 31,035 (1980). Certainly a proper final decision by the contracting officer goes a long way towards fulfilling this directive since it is a first attempt by the government to resolve the contractor's claims.

Two important considerations lie behind the requirement for a proper final decision. First, a well-reasoned and well-articulated decision of the contracting officer may convince the contractor that it should accept the decision. Similarly, the contracting officer, through the process of conducting an impartial and independent analysis, will recognize those claims that are valid and render a decision appropriately favorable to the contractor. This process, consequently, reduces the likelihood of appeals. New York Shipbuilding Corp., 385 F.2d at 435. Second, although an independent decision-making process cannot guarantee resolution of all disputes prior to litigation, the contractor and the government are at least more likely to compromise, or reach a partial agreement, during this process. In so doing, they focus and narrow the issues on appeal, thus shortening the litigation process. Dravo-Groves, ENGBCA No. 4801, 83-1 BCA ¶ 16,158 (1982) (contracting officer's decision an "important part of the process by which disputes are either resolved or reduced to their essential issues"). These considerations have

special import in these appeals involving a contractor that has recently emerged from bankruptcy. A proper decision is likely to reduce the scope of the dispute by eliminating the motivational factors that Mr. Videnieks' decisions invariably and continuously raise. If and to the extent that disputes remain after the conclusion of the current audit and issuance of a new final decision, they will be focused where they belong -- on issues of government contracts costs, and not on utterly extraneous matters.

3. INSLAW Contracted for a Fair and Impartial Decision by the Contracting Officer and It Should Get What It Contracted For

INSLAW is entitled to a proper final decision as a matter of law. G.S. & L. Mechanical & Construction, 87-2 BCA ¶ 19,882 at 100,579. The contract clearly requires that the contracting officer make an independent final decision; INSLAW is simply asking the Board to ensure that INSLAW receives what it contracted for.

A proper final decision will provide the most efficient and expeditious resolution of these disputes. DCAA's audit report, when presented to an independent contracting officer from another agency, should result in a settlement of

this case or at least resolution of significant portions of the claims.9/

This Board ordered the current DCAA audit for reasons consistent with the government policies behind having the contracting officer issue a proper final decision. For example, the Board initially ordered the DCAA to remain isolated from DOJ personnel so that DCAA could retain "some measure of independence from Justice Department control." Inslaw, Inc., 89-1 BCA ¶ 21,238 at 107,118.10/ In other words, the Board wants the DCAA to issue an independent audit report. Additionally, the Board noted that the audit should lessen the large discrepancy between INSLAW's claims and the contracting officer's decision in order to "facilitate and expedite the Board's task of resolving the dispute." Id. Along the same lines, the Board wants "to more precisely establish and limit the differences between the parties." Id.

9/ A decision from a contracting officer in another agency is warranted given the involvement of officials at the highest levels of DOJ in matters leading to INSLAW's recent Petition for Writ of Mandamus filed in the United States District Court for the District of Columbia. See Appendix C. In any event, remand at this point should at the very least streamline the litigation, because Messrs. Videnieks and Brewer will not participate in any further action on this contract; they are enjoined by order of the U.S. District Court for the District of Columbia from acting in any decision-making capacity, including that of the contracting officer, on this or any contract between INSLAW and DOJ. See Appendix D.

10/ The Board lifted this order on June 15, 1989, after INSLAW announced its plan to conduct a parallel audit of the contract. That audit now is in process.

These purposes are quite similar to the purposes of an independent contracting officer's decision -- to narrow and identify the issues in dispute. However, the DCAA audit, while fulfilling the purposes outlined by the Board, does not give INSLAW the major benefit of a final decision -- the DCAA audit does not necessarily result in any immediate payment of sums determined by DCAA to be allowable. Thus, unless the Board orders immediate payment of INSLAW's claims pending resolution of the disputes, an independent contracting officer's final decision is necessary to preclude continued withholding of payments from INSLAW -- withholding that may well otherwise continue for years through appeals.11/

11/ In Westinghouse Electric Corp., ASBCA No. 18,079, 73-2 BCA ¶ 10,207, the Armed Services Board was faced with a motion by the appellant to remand the case to the Director, DCAA for a determination of allowable costs. The board granted the motion, finding that the contract required the Director, DCAA to decide questions of cost allowability. It also stated that a proper decision is the quickest way to resolve the dispute and that the government could not unilaterally deprive the appellant of "a valuable agreement to have this dispute decided by an authority of special competence." Id. at 48,122.

In Westinghouse, the Director, DCAA served a function similar to that of the DCAA auditors in this case. However, in Westinghouse, the parties contracted for such a determination, and the DCAA auditor's findings would likely result in immediate payments to the contractor. See id. at 48,120. In this case, the parties did not have such an agreement and, absent a Board Order, the DCAA audit will not result in timely payments of moneys long withheld from INSLAW.

In any event, the parties here contracted for the contracting officer to render a proper final decision. Mr. Videnieks did not do so and, as in Westinghouse, the Board should therefore give effect to the provisions of the contract by remanding this case to a new contracting officer in an independent agency for a proper final decision. Moreover, the

III. CONCLUSION

Respondent has fought INSLAW over every nickel of this contract and continues to do so. It has failed to live up to its contractual duties or to Federal laws and regulations. Despite losing successive rounds of litigation in the federal courts, respondent refuses to acknowledge any wrongdoing or even to adequately investigate the actions of its personnel. See Appendix C. Rather, DOJ apparently wishes to re-litigate the issues before this Board. Through this motion, however, INSLAW presents a far more sensible solution -- a procedure that should assure a legitimate contracting officer's decision and, assuming disputes remain, should assure that the disputes are limited to issues of government contracts cost allowability.

INSLAW, therefore, respectfully requests that the Board: (1) demand that respondent pay INSLAW all pending claims and amounts due and owing under the contract in order to preclude continuing undue financial hardship to INSLAW; and (2) dismiss these appeals without prejudice and remand them to a new, independent contracting officer from another agency with

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(Footnote Continued)

Board should grant this remedy even if it also grants INSLAW's request for immediate payment of amounts that have been withheld. To the extent cost issues still exist after the issuance of DCAA's audit report, INSLAW is contractually entitled to have the issues addressed by an independent contracting officer.

COPY

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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INSLAW, INC.,

Petitioner,

v.

DICK THORNBURGH, as Attorney General of the United States, and UNITED STATES DEPARTMENT OF JUSTICE,

Respondents.

- x

Civil Action No. 89-3443 (WBB)

CLIN1/110-03

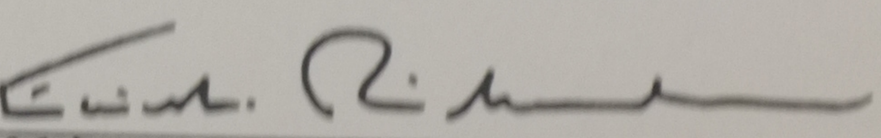
PETITIONER'S REQUEST FOR ORAL ARGUMENT ON RESPONDENTS' MOTION TO DISMISS THE PETITION FOR A WRIT OF MANDAMUS.

INSLAW respectfully requests oral argument on these matters at the Court's earliest convenience.

Dated: Washington, D.C.
April 17, 1990

Respectfully submitted,

MILBANK, TWEED, HADLEY & McCLOY

By: 

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ITEM AFFIDAVIT OF DANIEL P. SHEEHAN / CHRISTIC INSTITUTE

CL|CC|AF-01

about the existence of Operation 40 and its objectives -- but it does not appear that he or Robert Kennedy were ever briefed about the existence of the Shooter Team. However the Shooter Team continued to train -- and, indeed, between 1960 and 1963, initiated several efforts to assassinate Cuban President Fidel Castro.

70.6. Between January of 1961 and April of 1961, the low-profile, guerilla-infiltration strategy of Operation 40 was transmuted in a plan for a full-scale military invasion of Cuba, to be staged at the now-infamous Bay of Pigs. This invasion, using the personnel of Operation 40, failed disastrously in April of 1961.

70.7. However, by June of 1961, Robert Kennedy had re-grouped the tattered remnants of the old Operation 40 forces and re-initiated the old, lower-profile, strategy of infiltration and guerrilla "raids" into Cuba. This re-born Operation 40 was named "Operation Mongoose." This covert "Contra" war was secretly pursued by the Kennedy Administration from June of 1961 to November of 1963.

The supervisor of "Operation Mongoose" was, then 34-year-old, Theodore Shackley. His Deputy was Thomas Clines.

This operation, functioning in a working partnership with Mafia Lieutenant Santo Trafficante, operated from a base located in a few buildings on the campus of the University of Miami. This base -- and the operation itself -- came to be called "JM/Wave."

These "Contra" war operations -- and their associated Trafficante-lead political assassination sub-operation -- were directed by Theodore Shackley and Thomas Clines from 1961 to 1963.

70.8. During 1963, several participants in Operation 40 were caught smuggling narcotics into the U.S. from Cuba and the use, by the program, of former Batista and Trafficante criminal associates in the program began to cause "problems of control" of illegal "profiteering" in the program. But the program continued -- as did the operations of the "Shooter Team."

70.9. In November of 1963, President Kennedy was assassinated in Dallas, Texas.

70.10. In 1965, "Operation Mongoose," and JM/Wave, were shut down and Theodore Shackley and his Deputy, Thomas Clines were transferred to Laos.

The Move to Southeast Asia: Political Assassination Financed by Opium

70.11. In 1965, Theodore Shackley was made the Deputy Chief of Station for the CIA in Laos. Thomas Clines became his Deputy.

70.12. In 1965, Theodore Shackley and Thomas Clines secretly provided air support in Laos for one Van Pao, in a three-sided war in which Van Pao was engaged, in Laos, for control of part of the illegal opium trade in that nation. During 1965, Van Pao's competitors in the

opium trafficking business were mysteriously assassinated.

By 1966, Van Pao was one of the major opium producers and traffickers in Laos.

70.13. Under the direction of Deputy Chief of Station Theodore Shackley and his Deputy, Thomas Clines, a secret program was pursued to train indigenous Hmong tribesmen in guerilla war tactics for use in "unconventional warfare" activities. These activities included the art of political assassination. Starting in 1966, their "special operations" with the Hmong tribesmen began to be secretly financed by Van Pao.

70.14. In 1966, a "Special Operations Group" was established in Saigon, Viet Nam. This group was a multi-service, military operation known as the Military Assistance Command, Vietnam -- Special Operations Group (MACV-SOG) or the Joint Task Force for unconventional warfare.

This group, among other tasks, "supervised" the secret political assassination activities of this secret unit of Hmong tribesmen -- though the group operated, in fact, under the supervision of Theodore Shackley and Thomas Clines.

From 1966 to 1968, the commander of the Special Operations Group, which supervised the political assassination program in Laos, Cambodia, and Thailand, was Defendant General John K. Singlaub.

Serving under Singlaub in Laos for a period at the end of 1968 was a young 2nd Lt. by the name of Oliver North.

The Deputy Air Wing Commander for the Special Operations Group was then Air Force Lt. Col. Richard Secord out of Udorn AFB, Thailand. His superior was then Col. Harry C. "Heinie" Aderholt.

One of the members of the Army Special Forces units in the Group was one Dwight Owen -- the older brother of Defendant Robert Owen.

Between 1966 and 1971, this Special Operations Group based in Laos was, in fact, under the supervision of Theodore Shackley and Thomas Clines. During the period from 1966 to 1975, this Special Operations Group in Laos, through the secret Hmong tribesmen unit funded by a portion of Van Pao's opium income, secretly assassinated over 100,000 non-combatant village mayors, book-keepers, clerks and other civilian bureaucrats in the countries of Laos, Cambodia and Thailand.

70.15. In 1966, Theodore Shackley became CIA Chief of Station in Laos when former Station Chief Gordon Jorgenson was made Chief of Station in Vietnam. Thomas Clines continued to be a Deputy to Shackley in Laos. In early 1968, Shackley became Chief of Station in Saigon.

70.16. In 1968, Theodore Shackley's former associate in the JM/Wave program in Miami, Mafia Lieutenant Santo Trafficante, flew from Tampa, Florida, to Southeast Asia where he met at a hotel in Saigon with Shackley's Laotian associate Van Pao. In this meeting, Santo Trafficante agreed to become a partner with Van Pao in the importation of China White heroin into the United States. By 1969, Santo Trafficante had become the #1 importer and distributor of China White heroin in America. Van Pao's profits increased accordingly -- as did his financial contribution to the secret Hmong tribesmen assassination

and "unconventional warfare" project supervised by Theodore Shackley and Thomas Clines in Laos, Cambodia and Thailand.

70.17. In early 1972, Theodore Shackley and Thomas Clines were transferred from Saigon to the United States, where Theodore Shackley became the Chief of the CIA's Western Hemisphere operations. Thomas Clines became his Deputy. This division of the CIA directs the operations of the CIA in Central and Latin America.

From this post, Theodore Shackley and Thomas Clines directed the operation known as "Track II" in Chile which directed the political assassination of Chilean socialist President Salvador Allende and his Chief of Staff in Chile and the military overthrow of the democratically elected government of Chile in September of 1973.

70.18. Shortly before the successful overthrow of the socialist Chilean government in September of 1973, Theodore Shackley and Thomas Clines were transferred to Langley, Virginia; Shackley headed the East Asia Division with Clines as his Deputy.

70.19. From this post at Langley, Theodore Shackley and Thomas Clines directed the Phoenix Project in Vietnam in 1974 and 1975 which carried out the secret mission of assassinating members of the economic and political bureaucracy inside Vietnam to cripple the ability of that nation to function after the total US withdrawal from Vietnam. This Phoenix Project, during its history, carried out the political assassination, in Vietnam, of some 60,000 village mayors, treasurers, school teachers and other non-Viet Cong administrators.

70.20. Theodore Shackley and Thomas Clines financed a highly intensified phase of the Phoenix Project, in 1974 and 1975, by causing an intense flow of Van Pao opium money to be secretly brought into Vietnam for this purpose.

This Van Pao opium money was administered for Theodore Shackley and Thomas Clines by a US Navy official based in Saigon's US office of Naval Operations by the name of Richard Armitage.

Armitage functioned as the "bursar" for their Van Pao opium funds into the Vietnam Phoenix Project from 1973 to the fall of Vietnam in April of 1975.

The Birth of the Secret Team

70.21. However, because Theodore Shackley, Thomas Clines and Richard Armitage knew that their secret anti-communist extermination program was going to be shut down in Vietnam, Laos, Cambodia, and Thailand in the very near future, they, in 1973, began a highly secret non-CIA authorized program setting up their own private anti-communist assassination and unconventional warfare program -- to operate after the end of the Vietnam campaign.

70.22. Thus, from late 1973 until April of 1975, Theodore Shackley, Thomas Clines and Richard Armitage disbursed, from the secret, Laotian-

based, Van Pao opium fund, vastly more money than was required to finance even the highly intensified Phoenix Project in Vietnam. The money in excess of that used in Vietnam was secretly smuggled out of Vietnam in large suitcases, by Richard Secord and Thomas Clines -- and carried into Australia, where it was deposited in a secret, personal bank account (privately accessible to Theodore Shackley, Thomas Clines and Richard Secord).

During this same period of time between 1973 and 1975, Theodore Shackley and Thomas Clines caused thousands of tons of U.S. weapons, ammunition, and explosives to be secretly taken from Vietnam and stored at a secret "cache" hidden inside Thailand. The Van Pao monies in this secret Australian account and this large cache of stolen US weapons hidden deep inside Thailand were to be used by Theodore Shackley, Thomas Clines, Richard Secord, Richard Armitage and the right-wing covert operations operatives they could persuade to join their "off-lines", private "secret team" after the conclusion of the Vietnam campaign.

70.23. The "liaison officer" to Shackley and Clines and the Phoenix Project in Vietnam, during this 1973 to 1975 period, from the "40 Committee" in the Nixon White House was one Eric Von Marbod -- an Assistant Secretary of State for Far Eastern Affairs. Von Marbod shared his information about the Phoenix Project directly with his supervisor Henry Kissinger.

70.24. Saigon fell to the Vietnamese in April of 1975. The Vietnam War was over.

Post-Vietnam: Drugs, Arms Scams and Terror Continue

70.25. Immediately upon the conclusion of the evacuation of U.S. personnel form Vietnam, Richard Armitage was dispatched, by Theodore Shackley and Thomas Clines, from Vietnam to Tehran, Iran.

70.26. In Iran, Armitage (the "bursar"for the Van Pao opium money for Shackley and Clines' planned "Secret Team" covert operations program), between May and August of 1975, set up a secret "financial conduit" inside Iran, into which secret Van Pao drug funds could be deposited from Southeast Asia. The purpose of this conduit was to serve as the vehicle for secret funding, by Shackley's "Secret Team," of a private, non-CIA authorized "Black" operations inside Iran -- disposed to seek out, identify, and assassinate socialist and communist sympathizers -- who were viewed by Shackley and his "Secret Team" members to be "potential terrorists" against the Shah of Iran's government in Iran.

70.27. In late 1975 and early 1976, Theodore Shackley and Thomas Clines retained Edwin Wilson to travel to Tehran, Iran to head up the "Secret Team" covert "anti-terrorist" assassination program in Iran. This was not a U.S. government-authorized operation. This was a private operation supervised, directed and participated in by Shackley,

Clines, Secord and Armitage in their purely private capacities.

70.28. At the end of 1975, Richard Armitage took the post of a "Special Consultant" to the U.S. Department of Defense regarding American military personnel Missing In Action (MIAs) in Southeast Asia. In this capacity, Armitage was posted in the U.S. Embassy in Bangkok, Thailand.

There Armitage had top responsibility for locating and retrieving American MIA's in Southeast Asia. He worked at the Embassy with an associate, one Jerry O. Daniels.

From 1975 to 1977, Armitage held this post in Thailand. However, he did not perform the duties of this office. Instead, Armitage continued to function as the "bursar" for Theodore Shackley's "Secret Team," seeing to it that secret Van Pao opium funds were conducted from Laos, through Armitage in Thailand to both Tehran and the secret Shackley bank account in Australia at the Nugen-Hand Bank. The monies conducted by Armitage to Tehran were to fund Edwin Wilson's secret anti-terrorist "seek and destroy" operation on behalf of Theodore Shackley.

Armitage also devoted a portion of his time, between 1975 and 1977, in Bangkok, facilitating the escape from Laos, Cambodia and Thailand and the re-location elsewhere in the world, of numbers of the secret Hmong tribesmen group which had carried out the covert political assassination program for Theodore Shackley in Southeast Asia between 1966 and 1975. Assisting Richard Armitage in this operation was Jerry O. Daniels. Indeed, Jerry O. Daniels was a "bag-man" for Richard Armitage, assisting Armitage by physically transporting out of Thailand millions of dollars of Van Pao's secret opium money -- to finance the re-location of Theodore Shackley's Hmong tribesmen and to supply funds to Theodore Shackley's "Secret Team" operations.

At the U.S. Embassy in Bangkok, Richard Armitage also supervised the removal of arms, ammunition and explosives from the secret Shackley-Clines cache of munitions hidden inside Thailand between 1973 and 1975 -- for use by Shackley's "Secret Team." Assisting Armitage in this latter operations was one Daniel Arnold, the CIA Chief of Station in Thailand -- who joined Shackley's Secret Team -- **in his purely private capacity.**

The U.S. Ambassador to Thailand, one Morton Abramowitz, came to know of Armitage's involvement in the secret handling of Van Pao opium funds and caused to be initiated an internal State Department heroin smuggling investigations directed against Richard Armitage.

Armitage was the target of Embassy personnel complaints to the effect that he was utterly failing to perform his duties on behalf of American MIAs, and he reluctantly resigned as the D.O.D. Special Consultant on MIA's at the end of 1977.

From 1977 until 1979, Armitage remained in Bangkok opening and operating a business named The Far East Trading Company. This company had offices only in Bangkok and in Washington, D.C. This company was, in fact, from 1977 to 1979, merely a "front" for Armitage's secret operations conducting Van Pao opium money out of Southeast Asia to Tehran and the Nugen-Hand Bank in Australia to fund the ultra right-wing, private anti-communist "anti-terrorist" assassination program and

"unconventional warfare" operation of Theodore Shackley's and Thomas Cline's "Secret Team." During this period, between 1975 and 1979, in Bangkok, Richard Armitage lived in the home of Heinie Aderholt -- the former Air Wing Commander of Shackley's "Special Operations Group" in Laos -- who, between 1966 and 1968, had served as the immediate superior to Richard Secord, the Deputy Air Wing Commander of MACV-SOG. Secord, in 1975, was transferred from Vietnam to Tehran, Iran.

Early "Iran Arms Deal" Profit-Skimming

70.29. In 1976, Richard Secord moved to Tehran, Iran and became the Deputy Assistant Secretary of Defense in Iran, in charge of the Middle Eastern Division of the Defense Security Assistance Administration. In this capacity, Secord functioned as the chief operations officer for the U.S. Defense Department in the Middle East in charge of foreign military sales of U.S. aircraft, weapons and military equipment to Middle Eastern nations allied to the U.S.. Secord's immediate superior was Eric Von Marbod -- the former 40 Committee liaison officer to Theodore Shackley's Phoenix program in Vietnam from 1973 to 1975.

70.30. From 1976 to 1979, in Iran, Richard Secord supervised the sale of U.S. military aircraft and weapons to Middle Eastern Nations. However, Richard Secord did not authorize direct nation-to-nation sales of such equipment directly from the U.S. government to said Middle Eastern governments. Instead, Richard Secord conducted such sales through a "middle-man", one Albert Hakim.

By the use of middle-man Albert Hakim, Deputy Assistant Secretary of Defense Richard Secord **purchased** U.S. military aircraft and weapons from the U.S. government at the low **"manufacturer's cost"** -- but **sold** these U.S. aircraft and weapons to the client Middle Eastern nations at the much higher **"replacement cost."** Secord then caused to be paid to the U.S. government, out of the actual sale price obtained, only the lower amount equal to the lower manufacturer's cost. The difference, was secreted from the U.S. government. Secord and Albert Hakim secretly transferred these millions of dollars into Shackley's "Secret Team" operations inside Iran -- and into Shackley's secret Nugen-Hand bank account in Australia. Thus, by 1976, Defendant Albert Hakim had become a partner with Thomas Clines, Richard Secord and Richard Armitage in Theodore Shackley's "Secret Team."

70.31. Between 1976 and 1979, Shackley, Clines, Secord, Hakim, Wilson, and Armitage set up several corporations and subsidiaries around the world through which to conceal the operations of the Secret Team. Many of these corporations were set up in Switzerland. Some of these were: (1) Lake Resources, Inc.; (2) The Stanford Technology Trading Group, Inc.; and (3) Companie de Services Fiduciares. Other companies were set up in Central America, such as: (4) CSF, Investments, Ltd. and (5) Udall Research Corporation. Some were set up inside the United States by Edwin Wilson. Some of these were: (6) Orca Supply Company in Florida and (7) Consultants International in Washington, D.C.

Through these corporations, members of Theodore Shackley's "Secret Team" laundered hundreds of millions of dollars of secret Van Pao opium money and pilfered Foreign Military Sales proceeds between 1976 and 1979.

70.32. In January of 1979, Theodore Shackley, Thomas Clines, Richard Secord and Albert Hakim made Edwin Wilson a full partner in their "Secret Team" gunrunning board, establishing the corporation named the Egyptian-American Transport and Services Corporation.

The Contra Connection: The Secret Team Bargains with Somoza

70.33. In the Spring of 1978, Shackley, Clines, Secord and Hakim directed Edwin Wilson to travel to Nicaragua to make available to Nicaraguan dictator Anastasio Somoza, the private assassination services of Shackley's "Secret Team" -- the objective of which was to carry out the location of and the political assassination of the top leadership of the Sandinista revolutionary movement. This contract was tendered, and Wilson offered the assassination services of Shackley's "Secret Team" to Somoza, in the Spring of 1978, for the sum of $650,000 per year. This offer included the services of five (5) "counter-subversion specialists," at the price of $80,000 per year each and an annual expense account of $250,000 for the operation. One the five "specialists" was to be Defendant Rafael "Chi Chi" Quintero. The others were to be members of the 1960 Richard Nixon-Santo Trafficante "Shooter Team" assembled for Operation 40 (members of which were used as "operatives" for Shackley's political assassination operations form 1961 to the present).

Somoza felt that the price tag was too high for this project -- so he continued to negotiate for a lower price.

Persons who know of this 1978 approach to Somoza by Wilson on behalf of Shackley, Clines, Secord and Hakim are one Douglas Schlachter, Source #72, (presently in the Federal Witness Protection Program), one Christine Simmons, Source #73, and former United States Congressman Charles Wilson, Source #74.

70.34. Again, in the Spring of 1979, Theodore Shackley, Thomas Clines, Albert Hakim and Richard Secord sent Edwin Wilson to arrange a contract relationship between the "Secret Team" and Nicaraguan dictator Anastasio Somoza.

This time, the contract offer was to supply military equipment, ammunition and explosives to Somoza -- since Somoza's dictatorial government had been cut off from any supply of military equipment from the U.S. by President Jimmy Carter's invocation of the Harkin Amendment in early 1979.

While Edwin Wilson's trip to Somoza in the Spring of 1979 did not result in the establishment of this contract, the trip of Rafael "Chi Chi" Quintero, later, did. Thus, by early 1979, Theodore Shackley, Thomas Clines, Albert Hakim and Richard Secord (all partners together in this Egyptian-American Transport and Service Company) had a formal contractual relationship with Nicaraguan dictator Anastasio Somoza

pursuant to which this "Secret Team" supplied weapons, ammunition, aircraft and explosives to Somoza's Nicaraguan government -- despite the formal order of the United States President Jimmy Carter that no military equipment of any kind was to be provided to Somoza's Nicaraguan government.

70.35. Neither President Carter nor his Director of Central Intelligence, Stansfield Turner, knew or approved of the conduct of Theodore Shackley and his partners who supervised the Secret Team -- because Shackley and Clines had been ordered by Stansfield Turner to resign from the CIA in late 1978 or early 1979 -- when Turner learned that Shackley and Clines were business partners with Edwin Wilson, who was going to be publicly indicted (based on the disclosures of Kevin Mulcahey) for unlawfully supplying military explosives and weapons to Libya.

70.36. From March to July of 1979, Shackley's "Secret Team" supplied military equipment to Somoza in his capacity as the Dictator of Nicaragua. The man who met regularly with Somoza's representative to arrange these weapons shipments was Rafael "Chi Chi" Quintero.

The CIA Takes the Ball

70.37. When Somoza fled from Nicaragua on July 17, 1979, he travelled to an island in the Bahamas named North Cay. There he met with Rafael "Chi Chi" Quintero and other representatives of Theodore Shackley and his Secret Team associates.

In their July, 1979 meetings on North Cay, representatives of Theodore Shackley, Thomas Clines, Richard Secord and Albert Hakim entered into a contract to supply aircraft, weapons, ammunition, and military explosive to Somoza and his La Guardia Generals who had fled Nicaragua with him, to enable them, now as "Contras", to plan and prosecute -- against the U.S. government-recognized Sandinista government of Nicaragua -- a secret covert Contra war virtually identical to the one which Theodore Shackley and Thomas Clines had supervised against the socialist revolutionary government of Cuba from 1961 to 1965.

The man who met regularly with the Contra military field commanders, to advise them as to what weapons and equipment they needed -- and to see to it that this equipment was supplied to the Contras from 1979, through 1980, into 1981, was Rafael "Chi Chi" Quintero. He conducted his weapons supply activities through the Miami-based company named Orca Supply Company, a company set up by Edwin Wilson.

These secret supply operation to the Contras by Shackley's "Secret Team" continued until June of 1981 -- when the United States CIA officially (though covertly) took over this operation and assigned Vincent M. Cannistraro to take the place of Rafael "Chi Chi" Quintero as the "Supply Officer" for the Contra operation.

CLICWIMD-03

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL JAMES RICONOSCIUTO, Defendant.	MAGISTRATES DOCKET NO. CASE NO. COMPLAINT for VIOLATION of United States Code, Title 21, Sections 841(a)(1), and 841(b)(1)(B)(viii)

Before Franklin D. Burgess, United States Magistrate Judge
United States Courthouse, Tacoma, Washington

Thomas A. Phillips, being duly sworn on oath states:

COUNT I

On March 29, 1991, at Pierce County, within the Western District of Washington, MICHAEL JAMES RICONOSCIUTO knowingly and intentionally did distribute one hundred (100) grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II controlled substance under Title 21, United States Code, Section 812.

All in violation of Title 21, United States Code Sections 841 (a)(1) and (b)(1)(b)(viii).

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
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Francis J. Diskin
AUSA

And the complainant states:

1. I am a Special Agent of the Drug Enforcement Administration, United States Department of Justice, and have been so employed since October, 1987. In that capacity, I am assigned to investigate violations of the Controlled Substance Act (Title 21, United States Code, Section 801, et seq.).

2. On or about January 30, 1991, a Cooperating Individual (CI) advised me that the CI had obtained quantities of methamphetamine and methadone from Michael J. Riconosciuto over the past ten years. I was familiar with allegations of drug trafficking regarding Michael Riconosciuto based upon numerous conversations with other law enforcement officers and cooperating individuals over the past several years. I am also aware that Michael Riconosciuto was arrested in 1972 for manufacture of controlled substances subsequently convicted.

3. On February 7, 1991, a CI contacted Washington State Patrol Detective Ron Ritter, and advised Detective Ritter that Michael Riconosciuto had just delivered a quantity of purported methadone to the CI. Detective Ritter and Washington State Patrol Detective Sgt. Mike Matlick obtained the purported methadone from the CI as well as an audio cassette recording of a conversation between the CI and Riconosciuto. The methadone was tested by a DEA Forensic Chemist who advised me that the substance was 9.347 grams net weight of 97% pure methadone. I have reviewed the audio cassette recording of the conversation between the CI and Riconosciuto

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during which time they discuss the instant delivery of methadone and future delivery of methamphetamine and methadone, and the CI paid Riconosciuto two thousand dollars ($2,000.00) for past amounts of methadone and methamphetamine delivered to the CI by Riconosciuto.

4. On the evening of March 3, 1991, a CI advised me that Michael Riconosciuto had just delivered what was purported to be forty (40) grams of methadone and one pound of methamphetamine to the CI in Pierce County, Washington. I obtained the purported methadone and methamphetamine from the CI. The purported methamphetamine had the appearance and odor of methamphetamine and weighed approximately 528.1 gross grams. The purported methadone was similar in appearance to the methadone previously obtained from a CI on February 7, 1991. I also retrieved audio and video recordings of conversation between the CI and Riconosciuto during which they discuss the instant delivery and the CI paid Riconosciuto nine hundred dollars ($900.00) as payment for the methadone delivered by Riconosciuto to a CI on February 7, 1991.

5. On March 4, 1991, the CI advised me that Michael Riconosciuto had met with the CI in Pierce County, Washington to collect money for the March 3, 1991 delivery. I retrieved audio and video recordings of the meeting and have reviewed the recordings. During the conversation the CI paid Riconosciuto three hundred dollars ($300.00) and engaged in general conversation regarding drug trafficking.

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6. On March 10, 1991, the CI advised me that Michael Riconosciuto had met with the CI in Pierce County, Washington to collect money for the March 3, 1991 delivery. I retrieved audio and video recordings of the conversation between the CI and Riconosciuto during which the CI gave Riconosciuto four hundred dollars ($400.00) and discussed future payments. Riconosciuto and the CI also had a general discussion about drug dealing. Riconosciuto asked the CI if the CI had had any "heat" referring to law enforcement scrutiny.

7. On March 23, 1991, Michael Riconosciuto met with a CI in Lakebay, Washington. This meeting was surveilled by DEA Special Agents Yong Chin and Ian McKenzie. The meeting was also video and audio recorded. I have reviewed the recordings of the meeting, during which the CI paid Riconosciuto ten thousand dollars ($10,000.00) for the methamphetamine and methadone delivered to a CI on March 3, 1991. During the meeting, the CI told Riconosciuto that the CI did not have any "crank" (the street vernacular for methamphetamine) and needed another pound of methamphetamine. Riconosciuto asked the CI about his supply of "done" (referring to methadone). On several occasions, Riconosciuto inquired as to whether the CI had experienced any "heat" (referring to law enforcement scrutiny or intervention). Riconosciuto also outlined a procedure for the synthesis of methamphetamine for the CI and engaged in general conversation regarding supply, demand for and opinions about various controlled substances.

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8. On March 29, 1991, surveillance had been established on a residence in Lakebay, Washington by DEA Agents. At about 5:30 p.m., surveillance agents observed Michael Riconosciuto in the residence and through video and audio surveillance saw Riconosciuto deliver a quantity of methamphetamine to an individual identified as Steve Halvorson. Agents observed Halvorson pay Riconosciuto five thousand dollars ($5,000.00). During the conversation Riconosciuto told Halvorson that he had brought "crank" for Halvorson. Riconosciuto was then observed departing Halvorson's residence in a silver Honda bearing Washington license 689BXE. Agents observed Rodney Dean Hill driving the vehicle; Riconosciuto sitting in the front passenger seat and Andrea May Zumwalt sitting in the rear seat. Agents executed a vehicle stop approximately one mile from the Halvorson residence, placing Riconosciuto, Hill and Zumwalt under arrest. I searched Riconosciuto's person and found, among other things, two bundles of U.S. Currency. I noted that Riconosciuto emitted a strong chemical odor which I associate with chemicals used to manufacture methamphetamine.

9. After being advised of his rights pursuant to Miranda, Hill told Special Agent McKenzie and me that Riconosciuto arrived at a residence in SeaTac, Washington earlier that day by taxi; that it was his understanding that Riconosciuto had arrived in Seattle by airplane earlier that day, and that Riconosciuto had asked Hill for a ride to the Lakebay, Washington area. Hill further stated that he had performed the same service for Riconosciuto on two prior

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occasions. Hill said that Riconosciuto emitted a strong chemical odor which Hill associated with chemicals used to manufacture methamphetamine. Hill said that he had known Riconosciuto for approximately three months and had met him through Andrea Zumwalt. Hill also said that he is currently receiving methadone treatments and that Zumwalt was attempting to "kick" a heroin habit.

10. After being advised of her rights pursuant to Miranda, Zumwalt told me that she was just "along for the ride." Zumwalt also advised that Agents should talk to her boyfriend (Hill) since he knew more about what had happened.

11. I performed a field test on the purported methamphetamine and obtained positive results for the presence of methamphetamine. The purported methamphetamine weighed approximately 545.1 gross grams.

12. Based upon the foregoing information, I believe that Michael James Riconosciuto knowingly and intentionally did distribute one hundred (100) grams or more of a mixture or substance containing a detectable amount of methamphetamine on March 29, 1991, in Pierce County, Washington.

THOMAS A. PHILLIPS, Complainant
Special Agent, DEA

Complaint and affidavit sworn to before me and subscribed in my presence on this _____ day of April, 1991.

UNITED STATES MAGISTRATE JUDGE

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CL\CW\MD-04

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL JAMES RICONOSCIUTO, Defendant.	)	NO. MOTION FOR DETENTION HEARING

The United States moves for pretrial detention of defendants, pursuant to 18 U.S.C. § 3142(e) and (f).

1. Eligibility of Case. This case is eligible for a detention order because the case involves the following:

____ Crime of violence (18 U.S.C. § 3156)

____ Maximum sentence life imprisonment or death

__XX__ 10+ year drug offense

__XX__ Serious risk defendant will flee

____ Felony, with two prior convictions in above categories

____ Serious risk obstruction of justice

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2. Reason for Detention. The Court should detain defendants because there are no conditions of release which will reasonably assure:

XX Defendants' appearance as required

XX Safety of any other person and the community

3. Rebuttable Presumption. The United States will invoke the rebuttable presumption against defendant under § 3142(e). The presumption applies because: (check one or both)

XX Probable cause to believe defendant committed 10+ year drug offense or firearms offense, 18 U.S.C. § 924(c)

___ Previous conviction for "eligible" offense committed while on pretrial bond

4. Time for Detention Hearing. The United States requests the court conduct the detention hearing:

___ At first appearance

XX After a continuance of 3 days.

5. Other matters.

DATED this 1st day of April, 1991.

Respectfully submitted,

MIKE McKAY
United States Attorney

FRANCIS J. DISKIN
Assistant United States Attorney

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ISSUES PRESENTED

The following brief will not be presented as a "normal" brief. It is difficult to determine how to frame the appeal in this case since it is the government's position that appellant's counsel should never have the opportunity to review any of the evidence submitted and upon which the District Court relied in dismissing the action. Assuming the ex parte in camera procedure suggested by the government and adopted by the District Court is valid, whatever view appellant will have of the evidence submitted will have to be through the eyes of this Court of Appeals. Accordingly, appellant would ask this Court to view the ex parte submission with the following questions in mind:

1. Appellant submitted testimony that direct contact of a foreign national or a foreign police force to initiate an inquiry by a Special Agent of the Los Angeles office was contrary to established department policy. C.R. 15, p. 33:12-14. Is there evidence that a reversal of this policy was made after Mr. Gunderson left the FBI? Is there evidence that Special Agent GATES was not initiating an inquiry?[1] If contact was made in contravention of existing policy but

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[1] If so, plaintiff represents to this Court that it can produce evidence that GATES actually initiated several of the inquiries.

No. 90-55281
CV 89-4383 RG (KX)

United States Court of Appeal

For the Ninth Circuit

MERIDIAN INTERNATIONAL LOGISTICS, INC., a Nevada Corporation,

Plaintiff and Appellant,

vs.

THOMAS G. GATES,

Defendant and Respondent.

APPEAL FROM

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

APPELLANT'S OPENING BRIEF

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at the direction of GATES' superior, isn't contact still outside the scope of employment?

2. There is direct evidence that disclosing confidential information to outside authorities concerning an on-going investigation event to other police agencies is prohibited by FBI procedure. C.R. 15, p. 33:16-18. Is there evidence that FBI procedure in this regard has been changed and that a Special Agent may advise a foreign police force or foreign national that the FBI investigation has revealed a $500 million "share fraud," a Sydney based confidence scheme in 1982, and that officers of MIL were involved with the Mafia and Yakuza, is now allowed? Even if contact is now allowed shouldn't defamatory statements made in contravention of long established policy be viewed as ultra vires and made outside the course and scope of employment?

3. The government provided appellant no legal authority either for ex parte submission of the evidence it was relying on or in camera inspection of the ex parte submission and

I.

STATEMENT OF THE CASE

A. PRELIMINARY JURISDICTIONAL STATEMENTS

The District Court had removal jurisdiction under 28 U.S.C. §2679(d)(2) and had jurisdiction to hear the Motion to Dismiss under 28 U.S.C. §1331 and Federal Rule of Civil Procedure 12(b)(1) and (6). This Court has jurisdiction under 28 U.S.C. §1291 because the District Court's Order of Dismissal is a final decision. The Order Of Dismissal is appealable under 28 U.S.C. §1291. *Flood v. Harrington* (9th Cir. 1976) 532 F.2d 1248. The Notice of Appeal was timely as it was filed within the sixty (60) day time period as properly extended by the District Court under Federal Rule of Appellate Procedure 4(a)(5). Appellants do not seek attorneys fees for this appeal.

B. NATURE OF CASE

This is a lawsuit wherein the plaintiff alleges it was defamed by defendant and that defendant interfered with the prospective advantage of plaintiff. The complaint in this case was filed in the Los Angeles Superior Court of the State of California on June 16, 1989. It alleges as follows:

Meridian International Logistics, Inc. (hereinafter "MIL") is a Nevada corporation which has its primary place of business in Los Angeles. It does extensive business overseas, especially in Australia and Japan. MIL is engaged in the funding and support of innovative medical research and technologies, the marketing of a low

cost earth removal system, and is the holder of 100% of the stock of MERIDIAN ARMS CORPORATION (hereinafter "MAC").

Shortly before February 10, 1989 THOMAS GATES (hereinafter "GATES") directly contacted and published to the Australia Federal Police in Canberra, Brisbane, and Caisons, Queensland, Australia, and other foreign nationals in Innisfall, Queensland, Australia, other foreign nationals in Brisbane, Queensland Australia and to an individual in Tokyo, Japan, false and defamatory statements, to wit:

1. That MIL was guilty of a $500,000,000.00 "share fraud";

2. That MIL and officers of MIL had participated in a "Sydney based confidence scheme in 1982"; and

3. That MIL and officers of MIL were involved with the Gambino crime family (the "Mafia") and the Yakuza.

These statements were false and known by GATES to be false when made. GATES is alleged to be an employee of the Federal Bureau of Investigation (hereinafter, the "FBI"). However, paragraph four of the complaint alleged as follows:

> "Gates was <u>not</u> acting within the general scope of his authority, acted completely <u>outside</u> his authority, performed acts were <u>not</u> permitted by his duties, and intentionally inflicted injury on the Plaintiff."

In its Reply Memorandum served September 15, 1989, the government conceded the District Court had jurisdiction to review the course and scope determination of the United States Attorney. The government sought to have the District Court review the evidence lodged ex parte and under seal in camera and affirm the United States Attorney's factual determination based upon a review of the evidence. The government further urged that no discovery should be allowed because of its in camera showing.

Thus, the government was now grounding its Motion to Dismiss entirely on the factual showing set forth in the "Declarations And Documents In Support Of Reply Memorandum An Ex Parte Application." However, the government never served appellant with any of the "declarations and documents" upon which it relied and never served appellant with any document purporting to set forth the authority for what had no become, in essence, an in camera ex parte Motion to Dismiss under FRCP 12(b)(1) and (6). No reason was ever provided to MIL's counsel as to why the documents were submitted under seal. There was some reference to covert investigation in the Court's comments at the hearing:

> "I don't know, if this investigation was so covert, how did the plaintiff learn about it?" R.T. 4:7-8.

MIL filed written objections to this ex parte procedure on the grounds that it was highly irregular, violative of the local rules and deprived appellant of adequate notice and a meaningful opportunity to be heard. Although unaware of the

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